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LAW OF MASTER
AND
SERVANT.

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20 Geo. 2, c. 19.

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2 Summons.
3 Order for payment.
4 Warrant of distress.
5 Information for misusage, under section 2.
6 Summons.
7 Discharge.

4 Geo. 4, c. 34.

8 Information for misconduct, under section 3.
9 Warrant to apprehend.
10 Conviction.
11 Commitment.

MASTER AND SERVANT ACT, 1867.

12 Information and complaint, under s. 4.
13 Summons, under s. 4.
14 Warrant of apprehension, under s. 7.
15 Order for compensation, under s. 9.
16 Warrant of commitment for neglect to fulfil contract and find security, under s. 9.
17 Warrant of commitment in default of distress, under s. 11.
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THE LAW

OF

MASTER AND SERVANT.

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THE LAW

OF

MASTER AND SERVANT,

IN REGARD TO

CLERKS, ARTIZANS, DOMESTIC SERVANTS, AND LABOURERS IN HUSBANDRY.

By EDWARD SPIKE,
ATTORNEY-AT-LAW.

THIRD EDITION.

By CHARLES HAMILTON BROMBY, Esq., B.A.,
OF THE INNER TEMPLE, BARRISTER-AT-LAW.

LONDON:
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INTRODUCTION

TO THE

THIRD EDITION.

It has been thought well in preparing the present edition to retain, as far as possible, the original text and the original arrangement of the work. It has, however, been necessary, owing to recent legislative enactments, to re-write that portion which relates to the Criminal Law. A chapter has been added on the Law of Trade Unions and Strikes, and also one on the Law of Arrest for Crimes. A large number of additional Cases have been cited from the various Law Reports; the points decided in the more important cases are set out in the text, those of less importance, and merely illustrative of principles discussed in the text, are referred to in the foot notes. And an Appendix, giving a list of the Statutes now practically regulating the contract of service, has been added.

CHARLES HAMILTON BROMBY.

4, King's Bench Walk.

INTRODUCTION

TO THE

FIRST EDITION.

AMONG the various relations in society, there is scarcely one, perhaps, in which a knowledge of the law, as affecting the parties in their relative capacities, is more imperatively demanded, or more imperfectly possessed, than in that which forms the subject of the following Treatise. Even among professional men, unless of very considerable experience and research, the knowledge of this branch of the law must necessarily be very confined, from the circumstance of its being only to be acquired, either by steadily pursuing the subject through all the reports (for which but few can afford the requisite time), or by perusing the very voluminous works in which alone it has been treated of, and in which, consequently, the space devoted to it is very limited. The author having himself experienced this difficulty, and, in overcoming it, acquired the materials for, in a great degree, removing the obstacle for the future, has therefore been induced to arrange his notes, and bring them before the Public, in the hope that even the present imperfect work, from its accessibility and familiar style, may prove extensively useful,

not only to the law student, but to those also more immediately interested, namely, the parties themselves. In some few instances he has ventured, with a view to invite the attention of more competent persons to the points in question, to offer opinions and suggestions of his own; but in all such cases they will be found to be given as the mere doubts, or ideas, of the writer.

It will be seen that those branches of the Law of Master and Servant, which peculiarly relate to Agriculture, Manufactures, and Trades, are altogether omitted here, as being mostly regulated by distinct statutes, applicable only to a particular class, and not to servants in general, and as it was an especial object to confine the work to a very moderate size.

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13 Geo. 2, c. 8.
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9 Geo. 1, c. 27.

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LAW

OF

MASTER AND SERVANT.

I.—OF THE CONTRACT OF HIRING.

THE relation of master and servant, as acknowledged by the law of England, is founded in convenience, and may be said to exist wherever a person is retained and employed to perform work or business for another. There is a distinction between menial servants and such as are not employed in a menial capacity, as clerks, shopmen, governesses, and the like. A servant may be a menial servant though he does not reside within the walls of the master's house. Thus, where a head gardener was hired for a year, at 100*l.* wages, to superintend hot-houses, pineries, &c., and a house was assigned him within his master's grounds, and he had the privilege of taking in apprentices for a year at 15*l.* premium, and had five under-gardeners to assist him, it was held that he was a menial servant (*a*). There is another class of servants who are called labourers, those, that is, who are employed in husbandry or manufactures. And a fourth division may be said to be that of apprentices, where the servant is bound to his master for a term of years to be maintained and instructed by him; the word apprentice being derived from *apprendre*, to learn. Wherever the relation of master and servant exists, there must be a contract expressed or implied between them, that the one should enter for pay or other valuable consideration into the service of the other, and devote to him his personal skill and labour. This is called a contract of hiring, and the rules respecting it differ according to the capacity in which the servant undertakes to enter into the service of the master.

(*a*) Nowlan *v.* Ablett, 2 C. M. & R. 54; Wood's Inst. 51.

Where the contract of hiring relates to menial servants or domestics, it is usually understood that if the terms are general and not otherwise defined, either party may determine the service at pleasure upon a month's warning, or upon payment of a month's wages (*b*). It has been expressly decided in several cases (*c*) that a master may dismiss without notice, upon paying wages to the servant for one month beyond the period of discharge; indeed, the exercise of this right (or, at least, the assumption and exercise of such a power) by masters, and the acquiescence therein by domestic servants, is now a matter of every day occurrence. On hiring an ordinary domestic, or menial servant, therefore, if it be intended that the engagement shall determine at the end of the month, or at some other specific time; or that more, or less, than a month's warning, or wages, shall be given, or sufficient; these stipulations must be entered into in such manner as to be capable of proof, in order to rebut the presumption of its being a general hiring.

With respect to clerks, and other servants of this superior class, there is this distinction, that although, if the hiring be general, it will be construed to be for a year and so on until determined by notice, yet it must be by a notice expiring at the end of some current year; the rule that a month's warning, or wages, will be sufficient to determine the hiring at any period of the year, not applying to this class of servants: it is nowhere, however, decided what length of notice is required; probably three calendar months would be deemed requisite and sufficient (*d*). And the presumption that a clerk hired for an undefined period is hired for a year may be rebutted by evidence of the custom of the trade or of any special terms (*e*). Where the contract would otherwise be deemed a yearly hiring, the mode of payment of the wages will not

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(*b*) Cutter *v.* Powell, 6 T. R. 326.

(*c*) Robinson *v.* Hindman, 3 Esp. 235. Archard *v.* Horner, 3 Car. & P. 349. Nowlan *v.* Ablett, 2 C. M. & R. 54. Fawcett *v.* Cash, 5 B. & Ad. 904. Smith *v.* Hayward, 7 A. & E. 544. Fewings *v.* Tisdal, 1 Ex. Rep. 295.

(*d*) Beeston *v.* Collyer, 4 Bing 309. 12 Moo. 552. 2 C. & P. 607. Huttman *v.* Boulnois, 2 C. & P. 510. Gandall *v.* Pontigny, 1 Stark. 198. 4 Camp. 375. Todd *v.* Kellage, 22 Law J. 1, ex. Williams *v.* Byrne, 2 Nev. & P. 139; but see Bayley *v.* Rimmell, 1 Mees. & W. 506.

(*e*) Fairman *v.* Oakford, 5 H. & N. 635. Metsner *v.* Bolton, 9 Ex. 518.

vary the construction, nor affect its other incidents (*f*). With respect to the necessity of being prepared with proof of any stipulations, inconsistent with the implied terms of a general hiring, which may be made on engaging a clerk, a like observation to that above made with regard to domestic servants applies.

Although not usual, it would be better if, in all cases of hiring, the terms of the contract were reduced into writing, and signed by both parties: where the engagement is for upwards of a year, or for a twelvemonth to commence at a future day, as it is a contract which is not to be performed within a year from the making thereof, it comes within the fourth section of the Statute of Frauds (29 Car 2, c. 3), and must be in writing, or it will be void (*g*). An agreement for the hire of any labourer, artificer, manufacturer, or menial servant does not require a stamp. An instrument of apprenticeship where there is no premium or consideration, requires a half-crown stamp; where there is a premium or consideration, the stamp is an *ad valorem* one of five shillings for every five pounds and for every fractional part of five pounds of such premium or consideration. Instruments, however, relating to any poor child apprenticed by or at the sole charge of any public charity, or pursuant to any Act for the regulation of parish apprentices, require no stamp. (33 & 34 Vict. c. 97, s. 39, Sched., tits. "Agreement" and "Apprenticeship.") The premium or consideration must be fully and truly set out in the instrument of apprenticeship under a penalty of 20*l.*; the instrument also will be void in default of so doing. Where, however, the time of service is to commence at a future day, and to last for a year from that day, and the servant actually enters upon the service, a new contract may under some circumstances be inferred. In such a case, the contract is not a contract for more than a year within the Statute of Frauds so as to require to be in writing (*h*). The consideration for the services, and a sufficient mutuality, must appear upon

(*f*) Beeston *v.* Collyer, ubi supra. Ex parte Humphreys, 1 Mont. & B. 413. Fawcett *v.* Cash, 5 B. & Ad. 904.

(*g*) Bracegirdle *v.* Heald, 1 B. & Ald. 722. Snelling *v.* Huntingfield (Lord), 1 C. M. & R. 20. Beeston *v.* Collyer, 4 Bing. 309; 12 Moo. 552, S. C.

(*h*) Cawthorne *v.* Cordrey, 13 C. B. N. S. 406.

the face of the agreement; that is, it should express that the one hires, and the other engages to serve, at, or in consideration of, certain wages; whether in the shape of money, or food and clothing, signifies not: a mere gratuitous contract to stay with, and serve a person for two years, in order to learn a business, without any contract on the part of such person to employ or teach, having been decided to be void as an agreement without consideration, or mutuality (*i*). If a servant agrees with an intended employer to serve him for a term of years, and the latter covenants to pay so much a week for such service, the law does not imply from the agreement to serve a corresponding agreement to employ, and the employer may consequently dismiss the servant at any time without warning or notice, and refuse to provide him with further employment (*ii*). Where the stipulations on one side are fully expressed, and those on the other side are evidently only partially so, the rest may be implied (*k*). A contract by an infant, binding him to serve during a certain time for wages, but enabling the master to stop the work whenever he chooses, and to retain the wages during stoppage, has been held to be wholly void, as not being beneficial to the infant (*l*). The situation to be filled, and the term of hiring (if definite) should also be stated; in which case, if the servant outstayed the period for which he was engaged, it would, in this respect, afterwards fall within the terms of a general hiring: the omission of all mention as to the duration of the service would have the same effect from the first. A contract to find a person permanent employment means only that he shall be employed for some substantial period of time, and shall not be dismissed without a cause (*m*). If it be intended that the contract should be determinable during the term specified, or otherwise than according to the implied terms of a general

(*i*) Lees *v.* Whitcomb, 5 Bing. 34. 2 M. & P. 86; S. C. Sykes *v.* Dixon, 9 A. & E. 693.

(*ii*) Dunn *v.* Sayles, 5 Q. B. Rep. 685. Williamson *v.* Taylor, 5 Q. B. Rep. 175. Aspdin *v.* Austen, 5 Q. B. Rep. 671. Sed. vide Pilkington *v.* Scott, 15 M. & W. 660. Hartley *v.* Cummings, 5 C. B. Rep. 247.

(*k*) Pilkington *v.* Scott, 15 M & W. 660. Whittle *v.* Frankland, 5 L. T. N. S. 639. Powers *v.* Fowler, 4 E. & B. 518.

(*l*) R. *v.* Lord, 12 Q. B. Rep. 757; 17 Law J. 181, m. c.

(*m*) Hartley *v.* Cummings, and Pilkington *v.* Scott, ubi supra. Down *v.* Pinto, 9 Exch. Rep. 327. Elderton *v.* Emmens, 16 L. J. C. P. 209; 13 C. B. 495.

hiring, the special agreement should be carefully and distinctly set forth; and in the case of clerks, as the question is still open, the length of notice to be given by way of warning should invariably be expressed. A provision may also, with great advantage, be inserted, that the master shall be at liberty to retain out of the wages the value of any things that may be broken, or lost, by the servant, which cannot be done without an express stipulation to this effect (*n*); or, as is very commonly done at hotels and inns, a sum of money may be deposited by the servant in the hands of the master as a guarantee fund for the same purpose. And as the master will be bound to pay wages according to the actual length of service, although the servant may have improperly left his situation without notice, it would be well to stipulate that, in such case, the servant shall forfeit a month's wages, which the master shall be allowed to deduct out of the wages; otherwise the master's only remedy will be by action against the servant for damages (*o*). Where a livery is provided for the servant by the master, to entitle the servant to retain it on quitting his service, an express agreement to that effect is requisite, as without it the servant will be bound to deliver up his livery (*p*). There is no occasion to provide for the parties being at liberty to dissolve the contract by mutual consent, as, without any such provision, it may in this manner be put an end to at any time (*q*): so also by entering into a new and distinct contract, a mutual agreement to determine the original being thence necessarily inferred: but it will not be dissolved by the bankruptcy of the master (*q*), nor by a mere engagement to enter into a fresh contract (*r*). In this latter case, a servant, hired as footman and groom, entered into a subsequent engagement to bind himself to serve in a different capacity at higher wages and in a foreign country, and, in fact, accompanied his master to such foreign country: but it did not appear that the services performed abroad differed from those

(*n*) Le Loir *v.* Bristow, 4 Camp. 134.

(*o*) Huttman *v.* Boulnois, 2 C. & P. 510.

(*p*) Crocker *v.* Molyneux, 3 C. & P. 470, 349.

(*q*) Thomas *v.* Williams, 3 Nev. & M. 545; 1 Ad. & Ell. 685. Vide post.

(*r*) Rex *v.* Buckingham, 3 Nev. & M. 72; 5 B. & Ad. 953, S. C.

originally contracted for, or that the servant did actually enter into such proposed new contract, and, therefore, it was held that the first remained undissolved.

Domestic servants and clerks do not come within the provisions of the statute of 6 Geo. 3, c. 25, for "better regulating apprentices and persons working under contract," although the expression "other persons who contract with persons for certain terms," used therein, may at first sight seem so extensive as clearly to include them (*s*).

Servants in husbandry or manufactures are sometimes engaged by the day or week, but are understood to be hired for a year, when no particular time is limited and the wages are so much per annum. Thus, where in an action brought by a servant in husbandry, the declaration was on a special contract of hiring determinable on reasonable notice, and the breach alleged was, that the defendant had discharged the plaintiff without such notice, it was held that proof that the plaintiff was hired generally as a labourer in husbandry did not support the declaration, such hiring being in law a hiring for a year, and not determinable at any time on reasonable notice (*t*). By various Acts of parliament power is given to the justices of the peace to compel persons not having any visible livelihood to go out to service in husbandry, or in certain specific trades. And the justices are likewise empowered to determine differences arising between such labourers and their masters (*u*). The powers conferred by the stat. 5 Eliz. have been held to be confined to servants in husbandry; and an order of a justice for discharging a servant from her master's service was held to be void, and not merely voidable, because it did not appear on the order itself that she was a servant in husbandry (*x*). It may admit of doubt if, under the 20 Geo. 2 and 4 Geo. 4, justices have power to order payment on an information stating that a sum is due to complainant for wages for labour as a carpenter (*y*). But the 20 Geo. 2, giving magistrates juris-

(*s*) Kitchen *v.* Shaw, 1 N. & P. 791; 6 A. & E. 729, S. C.

(*t*) Lilley *v.* Elwin, 11 Q. B. Rep. 742.

(*u*) 5 Eliz. c 4. 6 Geo. 3, c. 25. 4 Geo 4, c. 34. 20 Geo. 2, c. 19. 5 Geo 4, c. 96. For a detailed list, see "The Chronological Table of Statutes."

(*x*) R. *v.* Hulcott, 6 T. R. 583.

(*y*) Wiles *v.* Cooper, 3 A. & E. 524.

diction to determine differences between masters and servants in husbandry, artificers, handicraftsmen, miners, potters, &c., and other labourers employed for a certain time, or in any other manner, respecting wages within certain sums, extends to labourers of all descriptions, and not merely in the particular trades or business there enumerated, and consequently has been held to include wages earned by a labourer who contracted to dig and stean a well for cattle, to be paid for by the foot, and who employed another to assist him in the work (*z*). It must, however, clearly appear that the relation of master and servant exists, or the justices will have no jurisdiction. Thus, where A. had contracted with B. to build a wall for a certain price, within a certain time, and having performed part of the work, refused to complete it; this was held not to be within the stat. 4 Geo. 4, c. 34, and a magistrate, who acted upon the complaint of B., and convicted and committed A. to prison, was held liable in an action for false imprisonment (*a*). A workman entered into a contract with a master to serve him for a term of two years; he absented himself, during the continuance of the contract, from the master's service, and under 4 Geo. 4, c. 34, s. 3, he was summoned before justices, convicted and committed. After the imprisonment had expired, and while the term still continued, he refused to return to his master's service, and was again summoned before justices, when he stated that he considered his contract determined by the commitment. The justices found that he *bonâ fide* believed that he could not be compelled to return to his employment, and dismissed the summons. It was, however, held by the Court of Queen's Bench, that the contract continued, and that, notwithstanding his conviction and imprisonment, he could be again convicted, and that such *bonâ fide* belief did not constitute a lawful excuse for his absence (*b*). In an action of trespass for false imprisonment, it appeared that the plaintiff had been committed to prison by warrant of a justice under stat. 4 Geo. 4, c. 34, s. 3. The warrant alleged that the plaintiff, a collier, had been

(*z*) Lowther *v.* Radnor, E. of, 8 East, 113. Ex parte Hughes, 2 Com. L. Rep. 1542.

(*a*) Lancaster v. Greaves, 9 B. & C. 628. Branwell *v.* Penneck, 7 B. & C. 536.

(*b*) Unwin *v.* Clarke, L. R. 1 Q. B. 417.

guilty of divers misdemeanors, particularly that he absented himself from the service of his masters before the term of his contract with them was completed, contrary to the form of the statute, &c. It was held that no conviction was necessary under the statute, and that the warrant, whether it was an order, or in the nature of a conviction, was the only instrument contemplated by the legislature; and the legality of the imprisonment depended upon the sufficiency of that instrument alone; and that, whether the warrant was to be construed with less strictness, as being in the nature of an order, or with greater strictness, as being in the nature of a conviction, it was bad, as it did not bring the case within the statute by averring either that the contract was in writing, or else that the service had been entered upon (*c*).

In regard to apprentices, it is usual that they should be bound by indenture to serve their masters, and be maintained and instructed by them. In general they are bound out by their friends, though with their own consent, testified by their executing the indentures; without which the transaction is not binding (*d*). The churchwardens and overseers of a parish not in a union, or the majority of them, are empowered, with the assent of two justices of the peace, to bind pauper children apprentices till 21 years of age. By stat. 7 & 8 Vict. c. 101, this power in parishes included in poor law unions is transferred to the guardians, who are enabled to act without the assent of justices (*e*). In such case the indentures are obligatory even though the apprentices do not execute them. A variety of statutes regulate the manner in which parish apprentices are to be bound, assigned, registered and maintained: and there are provisions by which the justices of the peace are empowered to settle disputes between such apprentices and their masters, and to discharge them from their indentures upon reasonable cause shown (*f*). Some of these provisions extend to apprentices generally, and give the justices jurisdiction even where the

(*c*) Lindsay *v.* Leigh, 11 Q. B. Rep. 455; et vide Turner's Case, 9 Q. B. Rep. 80. In re Geswood, 2 E. & B. 952.

(*d*) R. *v.* Arnesby, 3 B. & Ald. 584. See St. Nicholas, Rochester, *v.* St. Botolph, 31 L. J. M. C. 258.

(*e*) 5 Eliz. c. 4. 43 Eliz. c. 2. Cro. Car. 179. 7 & 8 Vict. c. 101. 18 Geo. 3, c. 47.

(*f*) See Appendix.

apprenticeship is not one made under the supervision of the parish authorities (*f*). Where an apprentice was bound to a master carrying on three trades, and during the apprenticeship the master abandoned one of those trades, it was held to be sufficient justification for the apprentice to leave the service before the expiration of the period of his apprenticeship (*g*). It is, however, a good defence to an action brought by an apprentice against his master for not teaching him, that he has quitted the service without leave (*h*). So in like manner it is a good defence for the master to prove that the apprentice would not be taught, and by his own wilful acts prevented the master from teaching him (*i*).

II.—OF WAGES.

To entitle a servant to wages no express agreement to that effect is required; but every retainer of a servant will be presumed to be in consideration of wages, until the contrary be shown, which may be done either by proving an express agreement that the services were to be rendered gratuitously, as with a view to a legacy from the employer (*ii*), or to being bound as an apprentice (*k*), or the like: or the presumption may be rebutted by showing that the services commenced, and have been continued, under such circumstances as render it improbable that any contract for wages was ever contemplated between the parties; as where a slave came over to England, with his master, in the capacity of servant, and so continued in this country (*l*); in which case it was held, that, although he had thereby become free, yet in the absence of an express agreement for wages, none could be implied. So where a man and his wife lived with a brother, and helped him in his business, it was held that they had no right to wages, unless the jury should

(*f*) See Appendix.
(*g*) Ellen *v.* Topp, 20 L. J. Ex. 241; 6 Ex. 424. See Batty *v.* Monks, 12 L. T. N. S. 882.
(*h*) Hughes *v.* Humphreys, 6 B. & C. 680.
(*i*) Raymond *v.* Minton, L. R. 1 Ex. 244.
(*ii*) Le Sage *v.* Coussmaker, 1 Esp. 188.
(*k*) Wilkins *v.* Wells, 2 C. & P. 231.
(*l*) Alfred *v.* Fitzjames (Marquis), 3 Esp. 3. Rex *v.* Thames Ditton, 4 Doug. 300.

be of opinion that there was an agreement, either express or implied, that payment should be made for their services (*m*). If it appears that it was either expressly or impliedly agreed that there should be some remuneration, but that the amount of it was left unsettled, the servant will be entitled to receive the fair value of his services (*n*). If the right to wages depends upon some condition, as, for example, the certificate, or the determination of some third party, no action can be maintained until the condition is accomplished, unless, indeed, the master wrongfully prevents the performance of the condition (*o*). In the common case of a young and inexperienced servant hiring herself in consideration of being found in necessaries, without any, or at most, trifling wages, the proof of this express contract would rebut any implied contract for any other or greater wages, arising merely from increased experience or skill, and could only be itself repelled by evidence of a subsequent express contract, or of circumstances from which the same might be inferred, to pay additional wages from a particular time. In the absence of any agreement for wages, express or implied, none can be claimed (*p*).

As was observed by Martin, B., in the case of *Reeve* v. *Reeve* (*q*), "Service, however long continued, creates no claim for remuneration, without a bargain for it, either expressed or implied, from circumstances showing an understanding on both sides that there should be payment." A party entered into the service of another under the following contract: "I hereby agree to enter into your service as a weekly manager, to commence from next Monday. The amount of payment I am to receive I leave entirely to you." It was held, by Alderson, B., against the opinion of Parke, B., that he was entitled to whatever was a reasonable remuneration (*r*). In another case the plaintiff wrote to the defendant as follows: "I agree to accept

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(*m*) Davies v. Davies, 9 C. & P. 87.

(*n*) Baillie v. Kell, 4 Bing. N C. 638. Peacock v. Peacock, 2 Camp. 45. Bryant v. Flight, 5 M. & W. 114.

(*o*) Morgan v. Birnie, 9 Bing. 673. Milner v. Field, 5 Ex. 829. Hockster v. De la Tour, 2 E. & B. 678.

(*p*) Osborne v. Governors of Guy's Hospital, Stra. 728.

(*q*) 1 F. & F. 280. Foord v. Morley, 1 F. & F. 496.

(*r*) Bryant v. Flight, 5 M. & W. 114; 3 Jur. 681.

the appointment of secretary of the Lancashire Cotton Mill Company, upon the following terms, viz., first, a salary of 300*l.* per annum, commencing at the present date, if the company be completely registered and put into operation; if not, I shall be satisfied with any remuneration for my time and labour you may think me deserving of and your means can afford." The defendant then wrote to the plaintiff as follows: "It is distinctly agreed and understood, that if the company is not formed and carried out, that part of your letter which alludes to your salary to be null and void, and that at the expiration of three months it is entirely left to me to give to you such sum of money as I may deem right, as compensation for labour done, in the event of the company not being carried out." The plaintiff rendered some services, but the company was not carried out: it was held that there was no contract upon which the plaintiff could recover any portion of his salary (*s*). Where the contract was to serve as an apothecary's assistant at such a salary as C. should think reasonable, it was held that, without making an application to C. to fix the salary, the assistant could not recover wages as for work and labour (*t*).

Where a servant was hired at certain wages, but in addition thereto, as an encouragement for his greater assiduity, his employer was to make him a present of 20*l.*, and the servant was to continue in the service at all events for one year, it was held that, for every year during the continuance of such service, the servant was entitled to the present of 20*l.*, the contract being impliedly renewed in all its parts yearly, till put an end to by one of the parties (*u*). No increase of duty or labour, by reason of alterations in the situation or arrangements of the master, will of itself entitle the servant to an increase of wages, but an express agreement to that effect is requisite; and in a case (*v*) where a deputy sought to recover against the executor of his deceased principal an increased salary for executing the duties

(*s*) Roberts *v.* Smith, 28 L. J. Ex. 164; 4 H. & N. 315.
(*t*) Owen *v.* Bowen, 4 C. & P. 93. And see Taylor *v* Brewer, 1 M. & S. 290. Jewry *v.* Busk, 5 Taunt. 302.
(*u*) Mansfield (Earl) *v.* Scott, 1 Clark & Fin. 319.
(*v*) Bell *v.* Drummond, Peake, 45.

of a new office to which the deceased had been appointed, it was observed, that had the plaintiff's case rested wholly on the fact of the new duty being imposed upon him, it would not have entitled him to come into a court of justice for an additional stipend on a *quantum meruit*: if it did, every porter in a shop, or clerk in an office, would, upon an increase of his master's business, be equally entitled to demand an increase of wages. But, upon the evidence produced, it clearly appeared that the testator himself thought that he ought to pay something, and the only matter in controversy between him and the plaintiff was the quantum of the additional allowance.

The right to wages is not affected by reason of the servant being unable, through temporary sickness or accidental injury, to render any services to his employer; and in the case of an agricultural servant it is laid down (*w*) that "if a servant, retained for a year, happen within the time of his service to fall sick, or to be hurt or lamed, or otherwise to become *non potens in corpore*, by the act of God, or in doing his master's business, yet the master must not therefore put such servant away, nor abate any part of his wages for such time;" but it should be observed, that although this passage is on principle equally applicable to the case of menial servants, yet it can only be *sub modo*, so as not to disturb, or interfere with, the master's right to determine the service by a month's warning or wages (*x*). In the case of a servant not menial, a temporary disability through sickness will have the effect of suspending his right to wages, if they are made to depend on the actual performance of service; thus, where by an agreement the defendants in an action for wages had taken the plaintiff into their service for five years, if he should so long live and be able to perform and actually perform the services contracted for, and upon like condition covenanted to pay him a certain salary, it was held that the plaintiff could

(*w*) Dalton's Just. c. 58, p. 141. Edit. 1742.

(*x*) Fawcett *v.* Cash, 3 Nev. & M. 177; 5 B. & Ad. 904. Robinson *v.* Hindman, 3 Esp. 235. Cutter *v.* Powell, 6 T. R. 320. Contra, Cald. 11, citing Temple *v.* Prescott.

not recover his salary for such time as he was absent from the place of his employment upon sick leave, though during that time he had not ceased to be in the service of the defendants (*y*).

Where a yearly servant (other than menial) is dismissed, for any of the causes which have been held to justify the master in discharging him without notice, he forfeits all right to wages for any part of that year, as the year must be completed before the servant is entitled to anything (*z*); and that, even though the master have recovered damages against him for the same act of misconduct (*a*); but it seems that menial servants would, nevertheless, be entitled to wages up to the day of dismissal, upon the ground, as it is said (*b*), of that being the general understanding on the subject; unless, indeed, the dismissal be for embezzlement or making away with the master's property, in which case it has been ruled (*c*) that the amount of the embezzlements is immaterial; and that though the arrear of wages may exceed the value, the servant cannot recover any part.

If a clerk or other yearly servant (not menial) improperly leave his situation without notice, not having any sufficient cause to justify the omission (*d*), it seems doubtful whether he does not thereby disentitle himself to any unpaid part of the current year's wages (*e*); but there can be no question that he would be liable to an action for leaving his service without notice.

It may be observed that, if a servant's wilful disobedience of orders be a good ground of dismissal and forfeiture of wages accruing due, of which there can scarcely be a doubt (*f*), the wilfully absenting himself from his situation in order to avoid the performance

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(*y*) Inglis *v.* East India Company, 18 L. T. 93, q.b.

(*z*) Rex *v.* Welford, Cald. 57. Spain *v.* Arnott, 2 Stark. 256. Atkin *v.* Acton, 4 C. & P. 208.

(*a*) Turner *v.* Robinson, 6 C. & P. 15.

(*b*) Cutter *v.* Powell, 6 T. R. 326. Robinson *v.* Hindman, 3 Esp. 235; 2 Sel. N. P. 1032.

(*c*) Brown *v.* Croft, 1 Chitt. Pr. Law, 82.

(*d*) Vide infra, index, tits. "Rights of Servants," "Discharge."

(*e*) Noy's Max, 90. Huttmann *v.* Boulnois, 2 C. & P. 510.

(*f*) Spain *v.* Arnott, 2 Stark. 256. Callo *v.* Brouncker, 4 C. & P. 518. Craufurd *v.* Reid, 1 Shaw, 124. Robinson *v.* Hindman, 3 Esp. 235. See Button *v.* Thompson, L. R. 4 C. P. 330.

of his duties must surely be so likewise. For what substantial difference is there between *refusing* and *wilfully neglecting* to perform a duty? It is conceived, none.

All contracts for personal services are put an end to by the death of either party, but rights of action under such contracts which have accrued previous to the death are not taken away. In a recent case the plaintiff was the administrator of one Stubbs, who had in his lifetime entered into a contract to perform certain work for the defendants in 15 months for 500*l.*, payable under the contract in five equal quarterly instalments. The deceased man Stubbs performed one quarter's work and received 100*l.* He then performed his work during the second and third quarters, and at the expiration of the third quarter became entitled to two further instalments of 100*l.* each. He then died. It was held that his death dissolved the contract, but did not divest his representative of the right of action, which had already vested in the deceased, to recover the 200*l.* (*g*). Though the death of a servant or of a master puts an end to the contract of service, yet in the case of a servant's death his personal representative will be entitled to a proportionate part of the current year's wages unless the contract be specially conditioned for a completion of the service (*h*). In the recent case of *Farrow* v. *Wilson*, the plaintiff was hired by one Pugh to serve as farm bailiff, at weekly wages, with other advantages, and a residence in a farm-house; the service to be determinable by a six months' notice on payment of six months' wages. Pugh died. It was held that the personal representative of Pugh was not bound to continue the plaintiff in the service, or to pay him six months' wages. If the master become bankrupt the servant is, by the Bankruptcy Act, 1869, placed in a better position than other creditors. By section 32, it is enacted: "The debts hereinafter mentioned shall be paid in priority of

(*g*) Stubbs *v.* Holywell Railway Company, L. R. 2 Ex. 311.

(*h*) Cutler *v.* Powell, 6 T. R. 320. Smith's Leading Cases, 8th ed., vol. 2, p. 1. Stubbs *v.* Holywell Railway Company, *supra* Boast *v.* Firth, L. R. 4 C. P. 1. Farrow *v.* Wilson, L. R. 4 C. P. 744.

all other debts. Between themselves such debts shall rank equally, viz., all wages or salary of any clerk or servant in the employment of the bankrupt at the date of the order of adjudication, not exceeding four weeks' wages or salary, and not exceeding 50*l.*; all wages of any labourer or workman in the employment of the bankrupt at the date of the order of adjudication, and not exceeding two months' wages." If any larger sum than that for which priority is given by the above section is due, the servant must prove for the difference, and take rank with the ordinary creditors. Where under a similar section of a former Act the commissioners rejected the claim of a clerk for three months' wages, and 81*7l.* for arrears of salary due to him as clerk and cashier to the bankrupt, on the ground that he was to have participated in the proceeds of a patent, it was held, on petition against their decision, that the claim was well founded (*i*). A similar provision in the previous statute relating to bankrupts (*k*) was held not to be confined to trade clerks, but to apply to cases where there was an engagement to serve of a more permanent nature than a weekly hiring (*l*). A clerk or a foreman engaged at a weekly salary, and to have two suits of clothes per annum, was held to be within the meaning of the provision (*m*); and where a clerk had served for upwards of six months he was held entitled to the allowance for wages, although the bankrupt had not actually been a trader for more than two months out of the six (*n*). The bankruptcy, however, of the master does not dissolve the contracts between him and his clerks or servants, and, therefore, the clerk of a bankrupt trader may, even after he has obtained his certificate, recover his salary for the whole year (*o*), giving credit for so much as he may have received under the bankruptcy. The contract of apprenticeship is one of a personal nature, and is therefore

(*i*) Ex parte Hickin, in re Ellins, 19 Law J. Bank. 8. 3 De G. & Sm. 662.
(*k*) 6 Geo. 4, c. 16, s. 48.
(*l*) Ex parte Neale, 1 Mont. & Mac. 194. Ex parte Gough, 1 Mont. & B. 417. Ex parte Collyer, 2 Mont. & A. 29.
(*m*) Ex parte Humphreys, 1 Mont. & B. 413. 3 Deac. & Ch. 114.
(*n*) Ex parte Gough, 3 Deac. & Chit. 189.
(*o*) Thomas v. Williams, 3 Nev. & M. 545; 1 Ad. & Ell. 685.

upon the principle above enunciated, in the absence of any stipulation to the contrary, put an end to by the death of either party, and upon such death there is no breach of contract upon which any action will lie against the executor, whether for damages, or for a return of a portion of the premium (*p*). The case of an apprentice whose master becomes bankrupt is provided for by the Bankruptcy Act, 1869, as follows:—

"Where at the time of the presentation of the petition for adjudication any person is apprenticed or is an articled clerk to the bankrupt, the order of adjudication shall, if either the bankrupt or apprentice or clerk give notice in writing to the trustee to that effect, be a complete discharge of the indenture of apprenticeship or articles of agreement, and if any money has been paid by or on behalf of such apprentice or clerk to the bankrupt as a fee, the trustee may, on the application of the apprentice or clerk, or of some person on his behalf, pay such sum as such trustee, subject to an appeal to the court, thinks reasonable, out of the bankrupt's property to or for the use of the apprentice or clerk, regard being had to the amount paid by him or on his behalf, and to the time during which he served with the bankrupt under the indenture or articles before the commencement of the bankruptcy, and to the other circumstances of the case.

"Where it appears expedient to a trustee he may on the application of any apprentice or articled clerk to the bankrupt, or any person acting on behalf of such apprentice or articled clerk, instead of acting under the preceding provisions, transfer the indenture of apprenticeship or articles of agreement to some other person" (*q*).

Where the apprenticeship fee had been paid, although the articles had not been executed, proof was allowed in a case under a similar section of a former bankruptcy Act (*r*).

A general contract of hiring may be dissolved at any time during the year by mutual consent, and, where

(*p*) Whincup v. Hughes, L. R. 6 C. P. 78.
(*q*) 32 & 33 Vict. c. 71, s. 33.
(*r*) Ex parte Haynes, 2 Gl. & J. 122.

so put an end to, an agreement may, in the absence of evidence to show that such was not the intention of the parties, be implied entitling the clerk or servant to recover salary *pro ratâ* (*s*); but whether he be so entitled or not is a question for the jury upon the whole circumstances. In an action by an assistant surgeon for wages, it was proved that the plaintiff had served the defendant for nearly half a year, and that payments were made during that time on account of wages, but not according to any yearly amount, or at any definite periods of the year. The plaintiff afterwards fell ill and was taken to a hospital, and after his recovery did not return to his employment, nor did the defendant require him to do so. It was held that there was no evidence of any hiring for a year, and that the plaintiff was entitled to recover wages on a *quantum meruit* for the time he served (*t*).

Care should be taken to be able to prove the payment of wages, and therefore it would be proper in all cases to take receipts for the same; although, if the servant have left his situation for any considerable length of time, the presumption will be that he has been paid (*u*). But where the servant is under age, the master may be considered to stand, as it were, in *loco parentis*, and it will not be safe to pay the servant her wages without seeing to the proper application of them, as, if spent in the purchase of articles of finery, or other things not necessary for, or not for the benefit of, the servant, the master will be liable to pay over again. In an action brought to recover the amount of a servant's wages (*x*), it appeared that money had been advanced by the master to the servant, who was then under age, on account of her wages, to enable her to pay for a silk dress, a reticule, lace for her caps, and various other articles, and that he had paid some coach fares for her and her mother; an account had also been settled with the servant and the balance paid to

(*s*) Thomas *v.* Williams, ubi supra. Lamburn *v.* Cruden, 2 Scott's N. R. 583; 2 Man. & Gr. 253, S. C.

(*t*) Bayley *v.* Rimmell, 1 M. & W. 506. Et vide Phillips *v.* Jones, 1 A. & E. 338.

(*u*) Sellen *v.* Norman, 4 C. & P. 80.

(*x*) Hedgley *v.* Holt, 4 C. & P. 104.

her: but it was determined, that the monies advanced to the servant, to enable her to pay for things not necessary, could not be set off against the servant's claim for wages, and that, as to so much only as was for the purchase of necessaries, the payment was valid.

Before the passing of the Married Women's Property Act, 1870, it was necessary, in all cases where a married woman was a servant, that care should be taken to ascertain that she had authority from her husband to receive money which she had earned, all money earned by the wife being then, in law, the property of the husband (*y*). So in *Offley* v. *Clay*, an action brought by a husband for money earned by his wife, it was held that if the defendant would avail himself of any payments made to the wife he should plead payment to the plaintiff, and that whether the wife had authority to receive was a question for the jury.

But now the wages and earnings of any married woman acquired or gained by her after the passing of the Married Women's Property Act, 1870, in any employment, occupation, or trade in which she is engaged, or which she carries on separately from her husband, and also any money or property so acquired by her through the exercise of any literary, artistic, or scientific skill, and all investments of such wages, earnings, money, or property shall be deemed and taken to be property held and settled to her separate use, independent of any husband to whom she may be married, and her receipts alone shall be a good discharge for such wages, earnings, money, and property (*z*). And, by a subsequent section, a married woman is enabled to maintain an action in her own name for the recovery of such wages, earnings, money, and property (*a*).

It is the duty of the master to pay the wages of his servant to the servant in money, when they become due. In order to prevent a practice which was formerly, and it is to be feared, still is, very prevalent, of paying workmen otherwise than in current coin, the Act 1 & 2 Will. 4, c. 37, known as the Truck Act, was passed. It is applicable only to those persons who contract as

(*y*) Buckley *v.* Collier, 1 Salk. 114. Offley *v.* Clay, 2 M. & G. 174.
(*z*) 33 & 34 Vict. c. 93, s. 1.
(*a*) Id. s. 11.

labourers, that is to say, to use their personal services, and to receive payment for such services as wages (*b*). An independent contractor employing men under him is not within the Act, though he personally labours from time to time (*c*).

Deduction or stoppages made from the wages of an artizan in the hosiery trade in respect of frame rent, standing of machines, winding the material, fines for irregular attendance, &c., amounting to a sum of about 3*s.* 9*d.* a week, fixed charges, were held not illegal (*d*). Sect. 23 of the Truck Act permits an employer to contract to supply the artificer with medicine, medical attendance, and materials to be employed in his occupation, if a miner, and to demise to the artificer a tenement at any rate reserved, and to contract to make stoppages or deductions from the wages in respect of rent, medical attendance, &c., provided the contract for such stoppages be in writing, and signed by the artificer. It was held that the amount to be deducted in respect of each head of deduction need not be specified in the written contract under this section, and, further, that the contract as to the supply of materials, in order to be within sect. 23, must be an absolute contract of sale, and not a mere hiring (*e*). Where an employer stopped part of the wages of an artificer, employed in a coal and iron works, as a contribution to funds established by him to provide medical attendance for the artificers employed by him, and schools for their children, without any written agreement, it was held that the artificer was entitled to recover from his employer the whole of the deductions (*f*).

By stat. 23 & 24 Vict. c. 151, s. 28, wages are to be paid to persons employed in mines in money. By stat. 33 & 34 Vict. c. 30, it is enacted that "no order for the attachment of the wages of any servant, labourer,

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(*b*) Riley *v.* Warden, 2 Ex. 59; 18 L. J. ex. 120.

(*c*) Sharman *v.* Sanders, 22 L. J. C. P. 86; 13 C. B. 166. Floyd *v.* Weaver, 21 L. J. Q. B. 151. Ingram *v.* Barnes, 7 E. & B. 115, 132 (Ex. Ch.); 26 L. J. Q. B. 82, 319. Sleeman *v.* Barrett, 2 H. & C. 934; 33 L. J. ex. 153.

(*d*) Archer *v.* James, 2 B. & S. 61; L. J. Q. B. 153. Chawner *v.* Cummings, 8 Q. B. 311.

(*e*) Cutts *v.* Ward, L. R. 2 Q. B. 357.

(*f*) Pillar *v.* Llynvi Coal Company L. R. 4 C. P. 752.

or workman shall be made by the judge of any court of record or inferior court."

Although a master is not bound to provide a servant with medicine (*h*), yet if the master, when a servant falls ill, calls in his own medical man, he cannot afterwards charge that against the servant's wages, unless there be a special contract between the master and servant that he should do so (*i*). So also with regard to goods lost or broken by the servant, unless it have been expressly stipulated between the parties that the master shall be allowed to retain out of, or set off against the servant's wages the value of such goods, it cannot be done, however gross the carelessness or misconduct of the servant may have been (*k*). The master's only remedy is by proceeding against the servant.

If a clerk or other yearly servant (except menial) be improperly dismissed before the expiration of the year, or other time of his hiring, he may, on showing his readiness to complete the service, recover wages for the full time of hiring (*l*): and it seems that where the clerk has served part of a quarter, and is willing to serve the residue, he will in contemplation of law be considered to have served the whole, and be entitled therefore to recover the quarter's salary under the common count for work and labour. It has been held that the wages cannot be recovered under the common count for work and labour, unless the period for which they were payable has elapsed before action brought (*m*). The audit clerk of a railway company, under an agreement for 140*l.* a year, determinable by three months' notice, or payment of three months' salary, was improperly dismissed without notice; and being sued by the company for monies in his hands belonging to them, claimed to set off the three months' salary payable to him under the agreement, and was held

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(*h*) Wennall *v.* Adney, 3 B. & P. 247. Rex *v.* Smith, 8 Car. & P. 153.

(*i*) Sellen *v.* Norman, 4 C. & P. 80. Lamb *v.* Bunce, 4 M. & S. 275.

(*k*) Le Loir *v.* Bristow, 4 Camp. 134.

(*l*) Gandall *v.* Pontigny, 4 Camp. 375; 1 Stark, 198. Collins *v.* Price, 2 M. & P. 233. Pagani *v.* Gandolfi, 2 C. & P. 370. Smith *v.* Thompson, 8 C. B. Rep. 44.

(*m*) Smith *v.* Hayward, 7 Ad. & E. 544; 15 Leg. Obs. 59; and see Archard *v.* Horner, 3 C. & P. 349.

entitled to do so, the dismissal having been improper and without notice (*n*). Where a plaintiff had been employed by two partners, against both of whom he had brought an action of assumpsit for wages, to which they pleaded that on a dissolution of partnership it was agreed between them that one of them alone should be liable for the debts, and that the plaintiff knew of and assented to that arrangement; it was held that, notwithstanding a verdict for the defendants upon this issue, the plaintiff was entitled to judgment, the plea only alleging a discharge of one, whereas to entitle the defendants to judgment it was requisite to construe it as a discharge of both the partners (*o*). If the dismissal is justifiable, as where a servant is discharged for improper conduct, it has been held that the servant cannot recover any part of the salary current from the last pay day at the time of his dismissal (*p*).

It has been held that if a master agrees to take a servant into his service at a future fixed time, and afterwards, before the time, expressly renounces and withdraws from his agreement, the servant may at once, although the time for the commencement of the service has not arrived, bring an action against his master to recover damages for the loss of the situation (*q*). If a servant be wrongfully discharged by his master he may at once bring an action against his master for the breach of contract in so discharging him (*r*), or he may treat the contract as rescinded, and sue for the value of the services actually rendered by him (*s*). Where the action is brought to recover wages actually earned, the common *indebitatus* count for work and labour done is sufficient; but it is not sufficient so to declare to recover a month's wages due in lieu of a month's warning; in the latter case a special count is the proper form of declaration (*t*). If the

(*n*) East Anglian Railway Company *v.* Lythgoe, 20 L. J. C. P. 84.

(*o*) Thomas *v.* Shillibeer, 1 M. & W. 124.

(*p*) Ridgway *v.* Hungerford Market Company, 3 A. & E. 171.

(*q*) Hochster *v.* De la Tour, 2 E. & B. 678. Danube" Railway Company *v.* Zenos, 11 C. B. N. S. 152; 13 C. B. N. S. 825 (Ex. Ch.). Frost *v.* Knight, L. R. 7 Ex. 111 (Ex. Ch.)

(*r*) Pagani *v.* Gandolfi, 2 C. & P. 370. Smith's Leading Cases, 6th ed. 40.

(*s*) Smith's Leading Cases, id.

(*t*) Bullen and Leake's Precedents of Pleading, 3rd ed., pp. 40, 220, 221.

amount due to the servant does not exceed 50*l.*, the action may be brought in the county court (*u*); and, by consent of both parties, the county court may try actions without limit as to amount. Unless the amount due exceed 20*l.*, the action should be brought in the county court, otherwise the planitiff will, in the absence of any special circumstances inducing the judge of the court to direct otherwise, be deprived of costs (*x*). A minor may sue in his or her own name in the county court for wages or for work done as a servant, but in the superior courts a minor must in all cases sue by a guardian or next friend (*y*). A plaint may be entered in the county court, within the district of which the defendant or one of the defendants shall dwell or carry on his business at the time of bringing the action or suit, or it may be entered by leave of the judge or registrar, in the county court within the district of which the defendant, or one of the defendants, dwelt, or carried on business, at any time within six calendar months next before the time of action or suit brought, or with the like leave, in the county court in the district of which the cause of action or suit wholly or in part arose (*z*). If both the plaintiff and the defendant dwell or carry on business in the metropolis the action, if brought in the county court, may be brought in the court in the district of which either the plaintiff or the defendant dwells or carries on business (*a*). In certain trades the justices have jurisdiction to settle disputes of trifling amount as to wages between masters and servants.

(*u*) 13 & 14 Vict. c. 61, s. 1.
(*x*) 30 & 31 Vict. c. 142, s. 5.
(*y*) 9 & 10 Vict. c. 95, s. 64. 13 & 14 Vict. c. 61, s. 1. 2 Chitt. Prac., 12th ed., 1240.
(*z*) 30 & 31 Vict c. 142, s. 1.
(*a*) 19 & 20 Vict. c. 108, s. 18.

III.—OF THE RIGHTS OF THE MASTER.

1st. As against the Servant.
2nd. As against Strangers.

1. In the ordinary case of a general hiring, which has already been shown to be a hiring for a year, the law implies a contract on the part of the servant to obey the lawful commands of the master, and to work at all reasonable hours, when required, during the whole and every part of that year (*c*). If there be any agreement between the parties that the servant shall be allowed any particular portion of the day or year to himself (which will never be implied), it ceases to be a general hiring, and becomes what is termed an exceptive hiring,—that is, a hiring for a certain portion or portions, and not the whole, of the year; and service thereunder will not confer a settlement. Therefore, in the absence of all stipulation on the subject, it would seem that the master may at any time require the performance by his servant of any lawful and reasonable service whatever; and the servant is bound to execute the same with all reasonable despatch, and to the best of his skill and ability. This general right, however, is so universally restrained, either expressly, or by implication, that the limited right may be considered the ordinary rule, and the general right the exception. It may be expressly limited by a stipulation that the servant shall only be required to render certain defined services, or that certain others shall not be required of him; or, which is the more common and ordinary case, it may be impliedly restrained, as by hiring a servant to fill a particular capacity.

In order to ascertain, therefore, whether a master is entitled to exact from his servant any particular service, it is necessary to inquire, first, what were the services contracted for? and, secondly, does the service required come within the scope of them? Where the

(*c*) Rex *v.* St. John, Devizes, 4 M. & R. 680; 9 B. & C. 900.

servant has only agreed to render certain defined services, as, to collect monies, or solicit orders for his employer, or even to act as clerk, questions can seldom, if ever, arise; nor, indeed, where the hiring is general, and the only stipulation is with regard to the services which shall not be required or rendered. The difficulty chiefly arises in respect to menial servants, where the limitation of the master's general right is merely to be implied, by reason of the servant having been hired to fill a particular capacity; in which case, if the extent or scope of the servant's contract is only to be ascertained by defining what are the peculiar duties attached to the situation denominated, to the exclusion of all others, the question would seem to be open to endless discussion, from the infinitely varied customs in different families: but if the true construction of such a contract on the part of the servant be, as it is submitted it ought to be, that the servant engages to fulfil and execute the duties peculiarly incident to that capacity, and in subordination thereto, to perform such other reasonable services as the master may require of him, and his time will allow, the difficulty is greatly lessened, if not altogether removed; and the universal practice of servants, before engaging themselves, inquiring what other servants are kept, strongly countenances such a view (on their part at least) of the contract. If it were otherwise, indeed, great violence would be done to the principle before stated, viz., that the master is entitled to require the servant to work at all reasonable hours during the continuance of the contract. Now, if the construction suggested be correct, the question whether the service required comes within the scope of those contracted for, seems capable of an easy solution, and, after all, to be nothing more than whether, or not, it be reasonable as regards such servant. To show that the courts would not be inclined to assign very narrow limits to the power of the master over his domestics, where not unreasonably exercised, reference may be made to the case in which a servant in husbandry, who usually breakfasted at five o'clock in the morning and dined about two, was ordered by his master to take a horse to the marsh, about a mile off, just as the dinner

was ready, and, upon his refusal to go till he had dined, was instantly discharged by his master, and one of the questions raised at the trial was as to the propriety of the dismissal (*d*); it was there said, that if the servant persisted in refusing to obey his master's orders, the latter was warranted in turning him away; that there was no contract between the parties, except that which the law made for them, and it might be hard upon the servant, but that it would be exceedingly inconvenient if the servant were to be permitted to set himself up to control his master in his domestic regulations, such as the time of dinner; that, after a refusal on the part of the servant to perform his work, the master was not bound to keep him on as a burthensome and useless servant to the end of the year; and that the question really came to this, whether the master or the servant was to have the superior authority.

In endeavouring to arrive at a conclusion, as to whether any given service may, or not, reasonably be required of a servant, hired to fill a particular capacity, not only must the nominal rank or class of the servant be taken into consideration, but also his real and acknowledged station in society as an individual: for instance, if the person be hired as a clerk, whether the situation be one of responsibility, and the clerk a person of education and middling rank; or, whether it be a situation of no importance, and the servant of little or no education or responsibility; in fact, such as are usually hired and paid by the week.

Assuming, then, that the service required be reasonable, as respects the servant in question, if he refuse, or wilfully neglect to obey, or wilfully disobey, or habitually neglect, his master's orders, he may be discharged forthwith (*e*); and, if the hiring be by the year, and the servant be other than a menial or domestic, he will not be entitled to any unpaid portion of the current year's wages (*f*).

In addition to the performance of certain services, a

(*d*) Spain *v.* Arnott, 2 Stark. 256.
(*e*) Callo *v.* Brouncker, 4 C. & P. 518.
(*f*) Spain *v.* Arnott, 2 Stark. 256. Craufurd *v.* Reid, 1 Shaw, 124. Robinson *v.* Hindman, 3 Esp. 235.

master may lay down, and insist upon the observance by his domestic servants of, such rules as he may think proper for the regulation of his household; and provided the same be reasonable, and the infringement of them interfere with the due economy of the family, there can be no reason to doubt the right of the master to dismiss, without notice, for the wilful breach or habitual neglect of such rules, or, as they may very fairly be termed, standing orders (*s*).

A master, as such, has no right to an invention because the inventor happens to be his servant at the time; but if the servant be a skilful person, purposely employed for the discovery of inventions, these will so much belong to the master as to enable the master to take out a patent for them (*t*).

With respect to the general duties of a servant, the rule is, that a paid servant is bound to observe with care and diligence the interests of his master, and to exercise the same vigilance and attention as the master himself would have done (*u*). If he undertakes an office of skill he impliedly represents himself to be possessed of the skill requisite for the due discharge of the functions of his office, and will be liable for a breach of contract if he does not possess that skill, or if possessing it he fails to exercise it; and an action of tort founded on contract might be maintained against him, if his employer sustains any damage through his want of skill: so also it has been established that a master may recover against his servant for doing any act, to the damage of the master, prohibited by law, or which is a breach of trust (*w*): and that the servant is bound to adhere to the reasonable orders and instructions of his master, and will be responsible for the consequences of a deviation from them, though done with a view to the master's benefit (*x*). But a master cannot recover against his servant for goods entrusted to, and accidentally, that is to say, without any neglect

(*s*) See Robinson *v.* Hindman, 3 Esp. 235. Craufurd *v.* Reid, 1 Shaw, 124.
(*t*) Bloxam *v.* Elsee, 1 C. & P. 558.
(*u*) Killsby *v.* Williams, 5 B. & Ald. 820. Moore, 244; and see Priestly *v.* Fowler, 3 Mees. & W. 7.
(*w*) Harmer *v.* Cornelius, 5 C. B. N. S. 236; 28 L. J. C. P. 85. Hussey *v.* Pusey, 1 Sid. 298.
(*x*) Dyer, 161. 4 Camp. 183.

or default, lost or damaged by him. But in order to charge the servant it must be proved that he was guilty of negligence (*y*), nor, even then, can he retain the amount of the damage out of the servant's wages, unless it have been so stipulated in the contract of hiring (*z*).

It is the duty of a clerk, or other person employed to receive and pay money for a principal, to keep and render true and explicit accounts and vouchers (*a*), and of a steward, to account periodically, although not called upon to do so; and if, through neglect in this respect, he should at a future time be unable to vouch his accounts, the Court of Chancery will not assist him (*b*).

If a servant improperly leave his situation without notice, an action will lie against him at the suit of his master (*c*); but neither in this case could the master retain any part of the wages actually then due. For breach of contract, whether express or implied, and for wanton damage, a master has precisely the same rights and remedies against his servant as against any other person, however inexpedient it may be to pursue the same, on account of the ordinary inability of the servant to pay the consequent expenses.

The master's remedy by discharge, as also for criminal misconduct, will be more conveniently considered in another place (*d*), and is, therefore, altogether omitted here.

It has been already shown, that by virtue of the contract of hiring the master becomes entitled to the full benefit of the services impliedly promised to be rendered by the servant; consequently, any act whereby the servant is hindered, or seduced, from rendering those services, either wholly or partially, is a wrong as regards the master, for which (unless it happen by unavoidable accident or misfortune) the law gives him a remedy against the wrong-doer, by a special action

(*y*) Savage *v.* Walthew, 11 Mod. 135. Nickson *v.* Brohan, 10 Mod. 111.

(*z*) Le Loir *v.* Bristow, 4 Camp. 134.

(*a*) Jenkins *v.* Gould, 3 Russ. 385.

(*b*) Ormond (Lady) *v.* Hutchinson, 13 Ves. 53.

(*c*) Huttman *v.* Boulnois, 2 C. & P. 510.

(*d*) Vide infra, tit. "Discharge." Liability of servant, criminally, inf.

to recover damages for the loss occasioned to the master, by reason of being deprived of the services of his servant, through the misconduct of the defendant; technically called an action of trespass, or on the case, *per quod servitium amisit* (*h*).

Notwithstanding this right, however, a master may defend his servant from being beaten, or, in other words, justify an assault in defence of his servant (*i*), although there is an early dictum to the contrary (*k*); or he may pursue his remedy at law by suing the wrong-doer for damages for the battery (*l*); and it will not be a defence to the action, that the servant has recovered damages for the same assault (*m*); the reason of this being, that the damages recovered by the servant were by way of compensation for the personal injury sustained by him, whilst those sought for by the master would be to remunerate him for the loss of his services. Where, however, the servant has been injured by the breach of a contract, made by the servant, the servant alone can sue to recover damages for such a breach, the master not being a party to the contract, has no rights under it, and is not allowed to recover, even though incidentally injured by the breach. Thus, where the plaintiff's servant was injured by the negligence of a railway company, it was held that the servant, who had himself contracted with the company by taking a ticket, could alone sue, and that the master could not recover in an action brought by him to recover damages for the loss of his servant's services (*n*).

Upon the same principle as that upon which a master is entitled to recover damages for an assault upon his servant, viz., because he has thereby been deprived of his services, a master may maintain an action for debauching his female servant (*o*); indeed, this is the sole foundation of all actions by parents for the seduc-

(*h*) Blake *v.* Lanyon, 6 T. R. 221.

(*i*) 2 Rol. Abr. 546. Tickell *v.* Read, Lofft, 215. 1 Hawk. b. 1, c. 50, s. 23.

(*k*) Lewerd *v.* Basilee, 1 Salk. 407.

(*l*) Ditcham *v.* Bond, 2 M. & S. 436. 3 Camp. 526. Hall *v.* Hollander, 4 B. & C. 660. Hodsoll *v.* Stallebrass, 11 A. & E. 301.

(*m*) Savill *v.* Kirby, 10 Mod. 386.

(*n*) Alton *v.* Midland Railway Company, 34 L. J. C. P. 292; 19 C. B. N. S. 213. Becker *v.* Great Eastern Railway Company, L. R. 5 Q. B. 241.

(*o*) Fores *v.* Wilson, Peake, 55. And see Irwin *v.* Dearman, 11 East, 23. 2 Sel. N. P. 1100.

tion of their daughters, and, where the situation of the daughter is such as not to admit of the relation of master and servant being presumed, the action cannot be sustained (*p*). But in order to discourage immorality, the courts have always held very slight evidence of service to be sufficient; it is sufficient in the case of a father, suing for the seduction of his daughter, to prove that the daughter was living with him, forming part of his family, and liable to his control and command. For the right to the daughter's services is sufficient (*q*). An action, too, will lie for enticing away from her home the plaintiff's daughter, though there be no allegation that the defendant debauched her, or that there was any binding contract of service between her and the plaintiff, an existing service *de facto* being sufficient (*r*). An action also lies at the suit of a master, against another, for an injury done to his servant, through the other's negligence, or that of his servant; but no additional damages can be recovered, on account of the injury to the plaintiff's parental feelings, by reason of the servant being also his son: and, it would seem, that the giving of such additional damages is confined to actions by parents for the seduction of their daughters (*s*).

The right to recover damages for a partial deprivation of services having been established, a similar right, where the deprivation is entire, would seem to follow as a natural consequence, and such is the fact; except where the act of the wrong-doer amounts to a felony, in which case the private or civil injury merges in the public or criminal, and no action will lie until public justice has been satisfied by a prosecution and the acquittal or conviction of the accused (*t*). Thus, an

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(*p*) Postlethwaite *v.* Parker, 3 Burr. 1878. Maunder *v.* Venn, Moody & M. 323. Dean *v.* Peel, 5 East, 45. Manvell *v.* Thompson, 2 Car. & P. 303. Harper *v.* Luffkin, 7 B. & C. 387. Bennett *v.* Allcott, 2 T. R. 166. Griffiths *v.* Teetgen, 24 L. J. 35, c. b. Randall *v.* Stephens, 23 L. Times, 211.

(*q*) Maunder *v.* Venn, Mo. & M. 323. Terrence *v.* Gibbins, 5 Q. B. 297. Terry *v.* Hutchinson, L. R. 3 Q. B. 599, 603. Bennett *v.* Allcott, 2 T. R. 168.

(*r*) Evans *v.* Walton, L. R. 2 C. P. 615.

(*s*) Martinez *v.* Gerber, 3 Scott's N. R. 387. Flemington *v.* Smithers, 2 C. & P. 292.

(*t*) Wellock *v.* Constantine, 7 L. T. N. S. 751. Crosby *v.* Leng, 12 East, 413.

action on the case will lie against a person, at the suit of the master, for inveigling a servant to quit his service (*q*); or for continuing to employ a servant after notice that his engagement with his former master had not determined (*r*); for although he would not be liable for employing the servant in ignorance of the previously existing engagement (*s*), yet from the moment of notice thereof he became an abettor of the servant in his misconduct by not forthwith discharging him; but if the time for which the servant was hired had expired, notwithstanding his having had no previous intention of quitting his master's service, the action will not lie (*t*); nor unless it be shown that the defendant knew the servant to be the plaintiff's (*u*). Trespass, however, cannot be maintained unless the servant be taken away with force; neither will an indictment lie (*w*): and, if the servant have paid the stipulated penalty for leaving before the expiration of his engagement, no action will lie against the party inducing such servant to quit his situation (*x*).

IV.—OF THE LIABILITY OF THE MASTER.

1*st. For the Negligence or Misconduct of his Servant.*
2*nd. For the Criminal Acts of his Servant.*
3*rd. For the Contracts of his Servant.*

1st. It is a well established maxim in law, that whoever does an act by the hands of another, shall be deemed to have done it himself. *Qui facit per alium facit per se;* that is, where the rights of third parties are not affected by such substituted performance.

(*q*) Gunter *v.* Astor, 4 Moore, 12. Hart *v.* Aldridge, Cowp. 54. Lumley *v.* Gye, 2 E. & B. 224.
(*r*) Blake *v.* Lanyon, 6 T. R. 221.
(*s*) Fawcett *v.* Beavres, 2 Lev. 63. Anon., Comb. 111.
(*t*) Nichol *v.* Martyn, 2 Esp. 734.
(*u*) Fawcett *v.* Beavres. Fores *v.* Wilson, ubi supra.
(*w*) Queen *v.* Daniel, 6 Mod. 182.
(*x*) Bird *v.* Randall, 3 Burr. 1345. S. P. 1 Blk. 387.

According to this maxim, then, it would seem to follow, that every act done by a servant in pursuance of his master's orders, may be looked upon as done by the master himself, and such is the fact; but as it must necessarily have been a mere matter of conjecture on the part of a stranger whether, on a particular occasion, the servant was or was not acting in obedience to the directions of his master, the knowledge of the truth being confined to their own breasts, and as it would be a gross injustice to the third person to make his remedy for an injury entirely dependent upon the interested testimony of one of the implicated parties, the law has carried the principle one step further, and it may now be taken as a general rule that a master is responsible for an act of misfeasance done by a servant of his in the ordinary course of his employment, that is the doing carelessly what the servant was employed to do, or what from the ordinary course of his service he might reasonably be supposed to have been employed to do. There is, however, an exception to this general rule, where the injured party stands, at the time of the injury, in such a relation to the master, that it may reasonably be presumed, he agreed to undertake the risk arising from the negligence of those whom the master employed. The distinction is thus put by Lord Cranworth, in Bartonshill Coal Company *v.* Reid (*y*): "So far as persons external to the master and his servants are concerned, the master is to be considered as responsible for every one of those servants . . . but the case is different where the question arises within the circle of the master and his servants." And, again, "The principle which makes the master liable to com plaints made *ab extra* does not make him liable to complaints *intra* the whole body consisting of himself and his workmen." Upon this ground the master is held irresponsible for injuries done by one servant to another, in the course of their common employment, or to a person who, by volunteering to assist a servant, puts himself in the position of the latter (*z*);

(*y*) 3 Macq. pp. 276, 277.
(*z*) Potter *v.* Faulkner, 1 B. & S. 800; 31 L. J. Q. B. 30. See Tebbutt *v.* Bristol and Exeter Railway Company, L. R. 6 Q. B. p. 76.

or to a guest in his house, who becomes for the time being a member of his family (*c*). In order to elucidate and facilitate the application of the foregoing rules of law, some authorities must be considered. It has been held that a master is responsible for the wrongful act of his servant even if it be wilful, or reckless or malicious, provided the act is done by the servant within the scope of his employment, and in furtherance of his master's business, or for his master's benefit (*d*); and this, although the servant may be disobeying private instructions given by the master to the servant, limiting, or controlling, the direction or authority which the servant, from the nature of the employment, would otherwise have had. Thus, where a passenger in a state of partial intoxication who at the end of an omnibus journey refused to get out and to pay his fare, was dragged out violently and recklessly, by the omnibus conductor, and caused to fall under the wheel of a passing cab, it was held that there was evidence to go to the jury of the wrongful act having been done by the servant in the course of his employment, and the proprietor of the omnibus was held responsible for the injury (*e*). Where an omnibus company gave written instructions to their drivers "to drive at a steady pace, and not on any account to race with or obstruct other omnibuses," and a driver, in disobedience to the instructions given by the omnibus company to their servants, wilfully obstructed another omnibus and drove against it and upset it; it was held that the instructions given by the omnibus company to their servants could not exonerate the company from responsibility for the misfeasance of their servant, so committed whilst carrying passengers for the benefit of the company (*f*). Where a carter, in defiance of his master's orders, left a horse and cart standing in the street whilst he went away to his dinner, and the horse ran away, and injured some pro-

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(*c*) Southcote *v.* Stanley, 1 H. & N. 247; 25 L. J. Ex. 339.

(*d*) Hussey *v.* Field, 2 Cr. M. & R. 432, 440.

(*e*) Seymour *v.* Greenwood, 6 H. & N. 359; 7 *Ib.* 355; 30 L. J. Ex. 169; *Ib.* 327.

(*f*) Limpus *v.* London General Omnibus Company, 1 H. & C. 526; 32 L. J. Ex. 34.

perty, the master was held responsible for the injury (*g*). Where a servant, in burning the heath in his master's close, through neglecting to take proper precautions against it, set fire to that of the plaintiff, the master was held liable (*h*); so where the servant of a pawnbroker accidentally lost a pledge, the master was held liable (*i*); so also, where the carriages of a plaintiff and defendant had become entangled, and the defendant's coachman, in order to extricate his master's carriage, whipped the horses in that of the plaintiff, and thereby occasioned an injury, the defendant was held liable for the consequences (*k*). Where the servant at the time he commits the wrong complained of is not acting within the scope of his employment as servant, but is carrying into effect some object of his own, the master is not responsible (*l*). Where the defendant employed a carpenter to make a signboard for him and obtained permission for him to work in the plaintiff's shed, and the carpenter, in lighting his pipe, negligently set fire to the shed, it was held that the plaintiff could not recover against the defendant, as the act of lighting the pipe was not connected with the employment on which he was engaged by the defendant (*m*). So also where a maid servant, in order to clear a chimney of soot, set fire to the soot with a quantity of furze and burnt the house down, it was held that the master was not responsible for the damage, as it was no part of the servant's duty, or within the scope of her ordinary employment, to clean the chimney, or to use fire for that purpose (*n*). A clerk in the service of a railway company, whose duty it is to issue tickets to passengers and receive the money, and keep it in a till under his charge, has no authority implied from the course of his employment to give into custody on behalf of the company a person whom he suspects has attempted to rob the till, after the attempt has ceased:

(*g*) Whatman *v.* Pearson, L. R. 3 C. P. 422.
(*h*) Tuberville *v.* Stampe, 1 Ld. Raym. 264.
(*i*) Jones *v.* Hart, 2 Salk. 441.
(*k*) Croft *v.* Allison, 4 B. & Ald. 590.
(*l*) Addison on Torts, p. 23. Noy's Maxims, ch. 44. Bac. Abr. Trespass, p. 435.
(*m*) Williams *v.* Jones, 33 L. J. Ex. 297.
(*n*) McKenzie *v.* Macleod, 10 Bing. 385; 3 L. J. N. S. C. P. 79.

as such arrest could not be necessary for the protection of the company's property. And consequently the company is not liable if the clerk does, under the influence of suspicions which turn out to be ill-founded, give a person into custody on a charge of having so attempted, after the attempt has ceased (*o*). If a servant, being on his master's business, go out of his way for his own purposes, and in so doing occasion damage through careless driving or the like, the master will be responsible; but if the servant were not upon his master's business at the time, and merely out upon some frolic of his own, or in pursuance of some object of his own, the master would not be liable (*p*). Where the defendant, a wine merchant, sent his carman and a clerk with a horse and cart to deliver some wine and bring back some empty bottles; on their return, when about a quarter of a mile from the defendant's offices, the carman, instead of performing his duty and driving to the offices, depositing the bottles, and taking the horse and cart to stables in the neighbourhood, was induced by the clerk, it being after business hours, to drive in quite another direction on business of the clerk's, and while they were thus driving the plaintiff was run over, owing to the negligence of the carman; it was held that the defendant was not liable. Cockburn, C. J., in delivering his judgment in this case, said:—"The true rule is that the master is only responsible as long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence in the course of his employment as servant. I am very far from saying, if the servant when going on his master's business took a somewhat longer road, that owing to this deviation he would cease to be in the employment of the master, so as to divest the latter of all liability; in such cases it is a question of degree as to how far the deviation could be considered as a separate journey. Such a con-

(*o*) Allen *v.* London and South Western Railway Company, L. R. 6 Q. B. 65. See Van Den Eynde *v.* Ulster Railway Company, 5 C. L. R. (Ir.) 328.

(*p*) Joel *v.* Morrison, 6 C. & P. 501. Michael *v.* Alestree, 2 Lev. 172. M'Manus *v.* Crickett, 1 East, 106. Whatman *v.* Pearson, L. R. 3 C. P. 424.

sideration is not applicable to the present case, because here the carman started on an entirely new and independent journey which had nothing at all to do with his employment" (*q*). Many of the Acts of parliament incorporating railway companies authorize servants of the company, without any formal warrant, to apprehend and detain persons who commit certain specified offences. If a servant of a railway company, in the scope of his employment, wrongfully arrests or detains persons supposed, though erroneously so, to have been guilty of such specified offences, the company will be responsible for such arrest or detention (*r*). Since frequently it is necessary for a decision to be arrived at without delay, as to whether a passenger shall be arrested or not, it must be presumed that the officers of the company charged with the management of the traffic have authority to decide the question, and consequently render the company liable if a mistake be made (*s*). If, however, an officer of a railway company arrest a person charged with an offence for which the company is not empowered to arrest, such arrest cannot be presumed, in the absence, at any rate, of evidence of express authority given by the company to the officer so to arrest, to be the act of the company, since a servant cannot by implication be supposed to be entrusted by his master with greater powers than the master himself has (*t*). Where therefore a station-master arrested a person travelling by a railway in charge of a horse, for not paying for the carriage of the horse on demand, and the railway company had no power by law to arrest a person for such non-payment, but only had power to detain the horse, it was held that no authority could be implied to the station-master, and consequently that the station-master and not

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(*q*) Storey *v.* Ashton, L. R. 4 Q. B. 476. Mitchell *v.* Crassweller, 13 C. B. 237; 22 L. J. C. P. 100.

(*r*) Goff *v.* Great Northern Railway Company, 30 L. J. Q. B. 148. See Edwards *v.* North London Railway Company, L. R. 5 C. P. 448, and Walker *v.* South Eastern Railway Company, L. R. 5 C. P. 640.

(*s*) Goff *v.* Great Northern Railway Company, 30 L. J. Q. B. 148.

(*t*) Chilton *v.* London and Croydon Railway Company, 16 M. & W. 231. Poulton *v.* London and South Western Railway Company, L. R. 2 Q. B. 534. Tollemache *v.* London and South Western Railway Company, 26 L. T. 223.

the company, was responsible (*u*). If, however, a master ratifies and adopts a wrongful act done by his servant for his benefit, though without his previous consent or authority, the master renders himself responsible for such act (*w*). To make a subsequent ratification equivalent to a prior command, the act must have been done avowedly on behalf and for the benefit of the master (*x*). If a servant of a railway company maliciously institute legal proceedings against a person without the knowledge or direction of the company, the servant only is liable for the wrong done (*z*). It has been doubted whether a corporation, such as, for instance, a railway company, can be liable for a malicious prosecution, because, as is suggested, it is impossible for a corporation, as such, to be guilty of such malice as is required to render it liable (*a*). If the malice which is complained of is the malice of the servant, unauthorized by the company, it is clear that the company cannot be rendered liable for it (*b*).

A fraud committed by the servant is not considered the fraud of the master, unless it be committed with the authority of the master, either expressly or impliedly given, or unless the act be done for the master's benefit, and be afterwards adopted and ratified by him (*c*). If the fraud be committed by the servant in the ordinary transaction and course of his master's business, the master is liable, though no express command or authority be proved (*d*). Where a trader

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(*u*) Poulton *v.* London and South Western Railway Company, ubi supra.

(*w*) Eastern Counties Railway Company *v.* Broom, 6 Ex. 327. Roe *v.* Birkenhead Railway Company, 7 Ex. 36. Goff *v.* Great Northern Railway Company, ubi supra.

(*x*) Wilson *v.* Barker, 4 B. & Ad. 614. Wilson *v.* Tumman, 6 Sc. N. R. 894; 6 M. & G. 242. Nicoll *v.* Glennie, 1 M. & S. 592. Brook *v.* Hook, L. R. 6 Ex. 89; 40 L. J. Ex. 50.

(*z*) Stevens *v.* Midland Railway Company, 10 Ex. 352; 23 L. J. Ex. 328.

(*a*) Stevens *v.* Midland Railway Company, supra. Henderson *v.* Midland Railway Company, 20 W. R. 23; 24 L. T. N. S. 881. See Western Bank of Scotland *v.* Addie, L. R. 1 Sc. App. 145.

(*b*) Stevens *v.* Midland Railway Company, supra. Walker *v.* South Eastern Railway Company, L. R. 5 C. P. 640.

(*c*) Udell *v.* Atherton, 7 H. & N. 181; 30 L. J. Ex. 337. Coleman *v.* Riches, 16 C. B. 104.

(*d*) Barwick *v.* English Joint Stock Bank, L. R. 2 Ex. 259. Wilson *v.* Fuller, 3 Q. B. 1010. Howard *v.* Sheward, L. R. 2 C. P. 148. See Western Bank of Scotland *v.* Addie, L. R. 1 Sc. App. 145.

harboured and concealed smuggled goods, which were discovered on his premises, and his servant, in his absence, procured a fabricated permit with a view to protect the goods, the trader was held liable in penalties for the illegal act of the servant, done in the conduct of the business for the master's benefit (*e*). If goods entrusted to the care of a person be stolen by that person's servant, such person will be responsible for the loss, unless he can show that he could not, by the exercise of due vigilance, have guarded against the theft (*f*). Thus, where a chronometer was sent to a watchmaker's to be repaired, and was placed by the watchmaker in a drawer in the shop, the watchmaker's own valuable watches, &c., being placed in an iron safe, and the drawer was broken open and the chronometer stolen by the watchmaker's servant, the safe being untouched, the watchmaker was held not to have been duly vigilant, and was held liable (*g*).

It is not always easy in practice to determine whether there is a relationship of master and servant between two parties so as to render the one liable for the misfeasance of the other. But, unless it is established that the inevitable result of an order given by one person to another is to cause the injury complained of, no action will lie against the person who merely gives the order, and does not personally interfere in its execution, unless a relationship of master and servant exists between the parties. When a person, therefore, entrusts the execution of a particular work, which is capable of being done without causing injury to third parties, to a contractor (that is to say, to a person who exercises an independent employment, and has independent dominion and control over the workmen engaged in the execution of the work), and injury is caused by the negligent or improper execution of the work, the party injured must bring his action against the contractor or his workmen, and not against the

(*e*) Attorney General *v.* Siddon, 1 C. & J. 220.

(*f*) Walker *v.* British Guarantee Association, 21 L. J. Q. B. 260. Hodgson *v.* Fullarton, 4 Taunt. 787.

(*g*) Clarke *v.* Earnshaw, Gow. 30. Addison on Torts, 3rd ed., p. 412.

employer (*e*). Thus, if a person order his house to be pulled down, he is not responsible for the negligence of the workmen employed by the builders for that purpose (*f*). Where the defendant, a builder, was employed by the committee of a club to execute certain alterations at the club house, including the preparation and fixing the gas-fittings; and he made a sub-contract with B., a gas-fitter, to execute this part of the work, it was held that the defendant was not liable for an injury sustained by the plaintiff through an explosion of the gas, the person through whose negligence the injury was occasioned not being a servant to the defendant, but merely a sub-contractor (*g*). In another case, the defendant employed a stevedore to unload a ship; the stevedore employed his own labourers, amongst whom was the plaintiff and also one of the defendant's crew, a man named Davis, whom he, the stevedore, paid, and over whom he had entire control; the plaintiff, being injured by the negligence of Davis, brought his action against the defendant; it was held, that the stevedore, and not the defendant, was the master of the plaintiff, and the person who would, if the plaintiff and Davis had not been fellow servants, have been responsible (*h*). The question of what is a common employment, and who are fellow servants, so as to relieve the master from liability to one servant for injury caused by his fellow's negligence, will be considered in a subsequent chapter.

The buyer of a bullock employed a licensed drover to drive it from Smithfield, and by the bye-laws of London, no one but a licensed drover could be so employed. The drover employed a boy to drive the bullock, together with others, the property of different persons, and mischief was occasioned by the bullock through the careless driving of the boy. It was held,

(*e*) Addison on Torts, p. 395. Cuthbertson *v.* Parsons, 12 C. B. 304. Daniel *v.* Metropolitan Railway Company, L. R. 5 H. of L. 45. Steel *v.* South Eastern Railway Company, 16 C. B. 550. Gray *v.* Pullen, 5 B. & S. 970. Butler *v.* Hunter, 7 H. & N. 826; 31 L. J. Ex. 214. Reedie *v.* London and North Western Railway Company, 4 Ex. 244.

(*f*) Butler *v.* Hunter, supra.

(*g*) Rapson *v.* Cubbitt, 9 M. & W. 710. See also Overton *v.* Freeman, 21 L. J. C. P. 52; Knight *v.* Fox, 5 Ex. 721; Allen *v.* Hayward, 7 Q. B. 966.

(*h*) Murray *v.* Currie, L. R. 6 C. P. 24; 40 L. J. C. P. 28.

that the buyer of the bullock was not liable for the injury, the party employed by him being a person recognised by law, as exercising a distinct calling, and the boy being servant not to the owner, but to the drover (*i*). In another case, where a company empowered by Act of parliament to construct a railway, contracted under seal with other persons to make a portion of the line, and by the contract reserved to themselves the power of dismissing any workmen of the contractor who might prove incompetent, and the workmen negligently constructed a bridge over a highway, and thereby caused the death of a person passing along the highway, by allowing a stone to fall upon him, it was held, in an action brought against the company by the administrator of the deceased, that the company were not the masters of the workmen, and were not liable for their negligence (*k*). Where, however, the owner of a barge hired two qualified persons to navigate it, and by their negligent management another vessel was injured, the men employed were considered servants of the owner of the barge, and he was held liable for the injury (*l*). And where the owner and occupier of premises adjoining the highway employed a person to make a drain therefrom to communicate with the common sewer, and an injury was occasioned by the obstruction of the highway, the owner of the house was held liable, though the person employed by him had the sole management of the work, and had several persons at work under him, by one of which the obstruction was caused (*m*). The mere fact of the owner having done nothing to prevent or abate the nuisance, and having silently acquiesced in a conversion of the highway into a place of deposit for materials brought from his premises, being evidence to go to the jury, that the materials had been so placed by his authority (*n*).

(*i*) Milligan *v.* Wedge, 12 A. & E. 737. Peachey *v.* Rowland, 22 L. J. C. P. 81.

(*k*) Reedie *v.* London and North Western Railway Company, 4 Ex. 244. Daniel *v.* Metropolitan Railway Company, L. R. 5 H. of L. 45.

(*l*) Martin *v.* Temperley, 4 Q. B. 298. Randleson *v.* Murray, 8 A. & E. 109. But see Murphy *v.* Caralli, 3 H. & C. 462, 34 L. J. Ex. 14, questioning Randleson *v.* Murray.

(*m*) Burgess *v.* Gray, 1 C. B. 578.

(*n*) Bush *v.* Steinman, 1 B. & P. 406. Ellis *v.* Sheffield Gas Company, 23 L. J. Q. B. 42.

By the custom of the realm, innkeepers are bound to keep the goods of their guests which are within their inns without subtraction or loss by day or night, so that no damage shall come to them from negligence by the innkeeper or his servants. The loss of the goods while at the inn will be presumptive evidence of negligence on the part of the innkeeper or his servants; but this presumption may be rebutted by positive evidence of attention and skilful management (*o*).

The innkeeper is now, by 26 & 27 Vict. c. 41, somewhat relieved from his common law liability if he exhibits in a conspicuous part of the hall or entrance of his inn the first section of the Act which so relieves him printed in plain type. There is no special obligation cast by law upon the keeper of a lodging-house to take care of his lodgers' goods, but it is the duty of every lodging-house keeper to take such care of his house as every prudent householder might be expected to take, and to be careful in the selection of his servants (*p*).

A servant, as, for instance, a steward or gardener, who merely hires labourers to work for his master, is not to be considered as an independent contractor so as to become responsible to persons injured by the negligence of such labourers, or so as to relieve the master from such responsibility (*q*). If, however, the work which is contracted for is wrongful, or work which must necessarily, without lawful excuse, injure third parties, the person ordering or contracting for the work is liable for the damage caused thereby, and cannot shield himself from responsibility by showing that the injury was not caused by himself personally, but by an independent contractor (*r*). If a person is compelled by law to perform certain work, he is not, by reason merely of his having employed a competent

(*o*) Dawson *v.* Chamney, 5 Q. B. 164. Calye's Case, 1 Sm. L. C., 6th ed., 105. Cashill *v.* Wright, 6 E. & B. 891, 900. Oppenheim *v.* White Lion Company, L. R. 6. C. P. 515.

(*p*) Holder *v.* Soulby, 8 C. B. N. S. 254; 29 L. J. C. P. 246. Dansey *v.* Richardson, 3 E. & B. 144; 23 L. J. Q. B. 223.

(*q*) Stone *v.* Cartwright, 6 T. R 411. Wilson *v.* Peto, 6 Moore, 49.

(*r*) Ellis *v.* Sheffield Gas Company, 2 E. & B. 767. Hole *v.* Sittingbourne Railway Company, 6 H. & N. 488; 30 L. J. Ex. 81. Blake *v.* Thirst, 2 H. & C. 20; 32 L. J. Ex. 188.

contractor to execute it for him, relieved from liability in case of non-performance (*s*). The hirer of a carriage and horses, to be driven by the servant of the owner, is not liable for the negligent driving of the servant (*t*). But the hirer may by personally interfering with the driver render himself liable. Thus, in the case of M'Laughlin v. Prior (*u*), where the defendant and others had hired a carriage and post-horses with postillions to go to Epsom races, and the postillion in "cutting in" to the line formed for the purpose of passing through a toll-gate, overturned a gig in which the plaintiff was seated, and injured him; it appeared that after the accident had happened, the defendant, who was on the driving-box, offered money to the injured party, and gave his card, and that the owner of the gig afterwards called on him, when the defendant observed that "cutting in" was all fair upon such occasions, and that he intended if the gig had gone quietly out, to have pulled up to let it in again: it was held that the jury were warranted in drawing the inference that the postillions had acted as they did with the sanction of the defendant, and that consequently he was liable in trespass for the injury done. It was in that case said by the court, in giving judgment, that the cases in which the hirer of a glass-coach or post-chaise had been held not to be responsible for the act of the driver, depended upon the circumstance that he had no power of selection, and no foreknowledge of the character of the driver, and that he ought not therefore to be responsible for any negligence or want of skill on his part; but in the case then before the court the question was whether the evidence did not show that the defendant had so conducted himself as to be liable as a co-trespasser with the postillions, either by the active part he took or from his tacit consent.

Where the act of the servant complained of was specifically ordered by the master, or necessarily

(*s*) Pickard *v.* Smith, 10 C. B. N. S. 470. Gray *v.* Pullen, 5 B. & S. 970; 33 L. J. Q. B. 169; 34 L. J. Q. B. 265.

(*t*) Laugher *v.* Pointer, 5 B. & C. 547. Quarman *v.* Burnett, 6 M. & W. 499. Dalzell *v.* Tyrer, E. B. & E. 899; 28 L. J. Q. B. 52.

(*u*) 4 M. & G. 48; 4 Sc. N. R. 655.

followed upon, or was comprised in his specific order, it may be charged in the declaration as the immediate act of the master (*a*). Where the act complained of is an independent act of the servant not specifically ordered, although one for which the master may be liable, it cannot be charged as the immediate act of the master. In the latter case, the liability of the master will depend upon whether the act of the servant was done in the course of his employment or not, as explained above (*b*).

Liability of Master for Criminal Act of Servant.

2nd. A master is not criminally responsible for the criminal acts of his servants unless he command them or personally co-operate in them. When, however, a master expressly commands his servant to do a thing which can only be done by the performance of a criminal act the master is held responsible criminally, but if the thing commanded is capable of being done in a manner not criminal, and is done by the servant in a manner which is criminal, the servant is alone responsible criminally, in the absence of evidence that the master authorized the servant to do it in a criminal manner (*c*). Where an innocent agent is employed to commit an offence, the employer, though not actually present when the offence is committed, may be liable criminally. Thus, where coal belonging to adjoining proprietors was extracted by the servants of a lessee of a coal mine without the sanction of such adjoining proprietors, in large quantities, and during a considerable period of time, under such circumstances that the lessee must have been aware of the wrong doing, though he had never personally interfered, the lessee was convicted of stealing (*d*). Erle, J., in the course of

(*a*) Bullen, Precedents of Pleading, 3rd ed., p. 362. Savignac *v.* Roome, 6 T. R. 125. Brucker *v.* Fromont, 6 T. R. 659. Gregory *v.* Piper, 9 B. & C. 591.

(*b*) Bullen's Precedents, id. M'Manus *v.* Crickett, 1 East, 106. Gordon *v.* Rolt, 4 Ex. 365. Sharrod *v.* London and North Western Railway Company, 4 Ex. 580.

(*c*) Peachey *v.* Rowland, 13 C. B. 182. See also Cooper *v.* Slade, 6 H. of L. Cases, 793.

(*d*) R. *v.* Bleasdale, 2 C. & K. 765. Michell *v.* Brown, 1 E. & B. 267; 28 L. J. M. C. 53. Searle *v.* Reynold, 7 B. & S. 704. R. *v.* Stephens, L. R. 1 Q. B. 702.

his judgment, observing, "The prisoner did not by his own hand pick or remove the coal, but if a man does by means of an innocent agent an act which amounts to a felony, the employer, and not the innocent agent, is the person accountable for that act." There are some cases in which the master has been held responsible criminally for the acts of his servant done without any express authority, but done in the course of his employment and so impliedly authorized by the master. As, for instance, where a trader harboured and concealed smuggled goods which were discovered on his premises, and his servant in his absence procured a fabricated permit with a view to protect the goods, the trader was held liable in penalties for the illegal acts of his servant, done in the conduct of the business for the master's benefit (*e*). Where the superintendant and engineer of certain gas-works, having a general authority from the directors of the company to whom the works belonged to manage the works, conveyed the refuse of gas into the Thames whereby the water was polluted, the directors being ignorant of the details of the management, but having no reason to suppose the original method by which the water was not polluted to have been discontinued, the directors were held liable for the acts of the superintendent and engineer (*f*). The owner of a slate quarry was indicted for a nuisance in obstructing a navigable river. He was unable through age to superintend the working of the quarry, and the nuisance was caused by neglect of his general orders, but it was held that it was his duty to take all proper precautions to prevent the rubbish from falling into the river, and that if a substantial part of the rubbish went into the river from having been improperly stacked, he was guilty of having caused a nuisance, although the act might have been committed without his knowledge, and against his general orders (*g*). A bookseller or publisher whose servant publishes a libel in the ordinary course of the business,

(*e*) Attorney General *v.* Siddon, 1 C. & J. 220.
(*f*) R. *v.* Medley, 6 C. & P. 292.
(*g*) R. *v.* Stephens, L. R. 1 Q. B. 702; 35 L. J. Q. B. 251. R. *v.* Great Northern Railway Company, 9 Q. B. 315. R. *v.* Train, 31 L. J. M. C. 169.

is criminally answerable even though the publication be without his knowledge (*f*). Evidence of a publication by the servant is *primâ facie* evidence against the master, but such evidence may be rebutted by proving that such publication was made without the knowledge, authority, or consent of the master, and that it did not arise from want of due care or caution on his part (*g*).

A master cannot be held criminally responsible for acts of his servant done beyond the scope of his employment (*h*). In the case of Parkes *v.* Prescott it is said by Byles, J., that "there is a great distinction between the authority which will make a man liable criminally and the authority which will make him liable civilly. A principal is not civilly liable for the acts of his agent, unless the agent's authority be by the agent duly pursued; but the principal may be criminally liable though the agent have deviated very widely from his authority; or as Lord Bacon puts it (Bacon's Maxims, p. 16), 'Lawful authority is to receive a strict interpretation; unlawful authority a wide and extended interpretation. *Mandata licita recipiunt strictam interpretationem sed illicita latam et extensam.*' Lord Bacon proceeds to comment on this maxim, and says, 'In committing of lawful authority, to another a party may limit it as strictly as it pleaseth him; but if the party authorized doe transgress his authority, though it be but in circumstance expressed, yet it shall be void in the whole act. But where a man is author and monitor to another to commit an unlawful act, then he shall not excuse himself by circumstances not pursued;' and further, 'a man cannot condition with an unlawful act, but he must at his peril take heed how he putteth himself into another man's hands'" (*i*).

(*f*) R. *v.* Almon, 5 Burr. 2689. R. *v.* Walter, 3 Esp. 21. R. *v.* Gutch, M. & M. 433. R. *v.* Dodd, 2 Sess. Ca. 33.

(*g*) 6 & 7 Vict. c. 96, s. 7.

(*h*) Harrison *v.* Leaper, 26 J. P. 69, 373. Olding *v.* Smith, 16 Jur. 497.

(*i*) Parkes *v.* Prescott, L. R. 4 Ex. 169, 182 (Ex. Ch.)

Liability of the Master for the Contracts of his Servant.

A servant, being a mere agent, it is quite clear that, simply as such, he has no authority whatever to bind his employer by his contracts; but the servant may be invested by the master with this power, either expressly, or by implication, and whether such power have been antecedently given, or be subsequently recognized by adoption of the contract, the effect will be the same (*k*). It must be noted that the master cannot ratify a contract made by his servant unless, at the time of contracting, the servant assumed to act for his master (*l*), and that there are some acts which are incapable of ratification, as, for instance, notices to quit, since a notice to quit, to be valid at all, must be one which at the time it was given, was rightly given and valid (*m*). A master, if he ratify and adopt a contract made on his behalf by his servant, but without his authority, must adopt the whole of the contract; he is not at liberty to adopt part and reject the rest (*n*). To raise the presumption of an implied authority, a single instance of recognition, by the master, of the contract of his servant, will somtimes suffice (*o*). Where evidence is given of an express authority, the liability of the master will be limited by the extent or scope of the authority proved. Where the authority is only implied, its extent must necessarily be a matter of inference, to be deduced from the course of dealing adopted, or sanctioned, by the master, and consequently the limit of his responsibility will in such case be equally undefined and uncertain. The latter species of authority is the most common, and the most mischievous in its effects; is frequently, indeed generally, unwittingly conferred, and its very existence, perhaps, only discovered by the master through being called upon to answer for its abuse.

(*k*) Rusby *v.* Scarlett, 5 Esp. 76.
(*l*) Wilson *v.* Tumman, 6 M. & G. 236. Brook *v.* Hook, L. R. 6 Ex. 89.
(*m*) Doe *v.* Walters, 10 B. & C. 626. Story on Agencys, 246.
(*n*) Foster *v.* Smith, 18 C. B. 156. Ramazotti *v.* Bowring, 29 L. J. C. P. 80.
(*o*) Hazard *v.* Tredwell, 1 Stra. 506. See Todd *v.* Robinson, Ry. & M. 217. Gilman *v.* Robinson, Ry. & M. 226.

We will now proceed to consider how this power may be given, and how far its limits may extend.

Where a servant is in the habit of transacting any particular branch of his master's affairs, he thereby derives a general authority and credit from him in all matters of the like nature; nor can this general authority be determined, or put an end to, so as to affect third persons acting on the faith of it, without notice to them of its determination. Therefore, where a servant, in the habit of transacting affairs of that nature, was sent to receive a draft on a banker, but instead of doing so, in order to save himself trouble, got a third party to cash the draft, and afterwards, and before the draft was presented, the banker failed, it was held that the master was bound by such act of his servant, and must bear the loss (*p*). So, if a horsedealer's servant be sent into a market to sell a horse, with express orders not to warrant him, but the servant do, notwithstanding, warrant the horse, the master will be bound by the warranty, because the servant is acting within the general scope of his authority (*q*). If, however, the employer be not a dealer, he must be taken to have given authority to his servant to sell the horse subject to the conditions, and upon the terms, usual in the market in which the horse is sold. And if the servant of a private individual entrusted on one occasion to sell a horse, takes upon himself, without any authority, to warrant the soundness of the animal, the master is not bound (*r*). If the servant be merely employed to deliver the thing sold, he clearly has no implied authority, so that the master will not be bound by his warranty unless an express authority be proved (*s*).

Again, if a bookkeeper in a coach-office engage to carry passengers, or goods, in a particular way, or for a certain price, his employers will be bound by his

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(*p*) Nickson *v.* Brohan, 10 Mod. 110.

(*q*) 1 Dow 45 (per Lord Eldon, 1813). Nickson *v.* Brohan, ubi supra. Fenn *v.* Harrison, 3 Term R. 760; 4 T. R. 177. Howard *v.* Sheward, 36 L. J. C. P. 42; L. R. 2 C. P. 148.

(*r*) Brady *v.* Todd, 9 C. B. N. S. 592; 30 L. J. (C. P.) 223. Fenn *v.* Harrison, 3 T. R. 760; 4 T. R. 177.

(*s*) Strode *v.* Dyson, 1 Smith, 400. Woodin *v.* Burford, 2 C. & M. 391; 4 Tyr. 264.

contract, because he is acting within the scope of his employment (*t*). Lord Tenterden observing, in the latter of these cases, that "If a person goes to the "office of a carrier, and asks what a thing will be done "for, and he is told by a clerk or servant, who is "transacting the business there, that it will be done "for a certain sum, the master can charge no more. "It is said that this person had no authority to make "such a bargain; however, I am of opinion that it "signifies nothing, in this case, whether the servant "did his duty, or made a mistake; for if the trees "were sent, on the faith that they would be taken at "a given price, in consequence of what the clerk said, "it is quite clear that the plaintiffs can recover no more. "If men were not bound by such bargains as this, "business could not go on." And so, where one defendant had contracted with his coachman to horse his carriage (*u*), and the other defendant had contracted with his groom to keep his horses properly shod, and supply them with medicine, when necessary (*x*), it was held that the masters were respectively liable to the plaintiffs, who supplied these things by the orders of the servant, as they came to their use, unless it could be shown that the plaintiffs knew of the agreement between the master and servant, and gave credit to the latter accordingly. But a bookkeeper's implied authority does not extend to enable him to bind his employer, by a promise to make good a lost parcel, unless it be proved that he is employed as a general agent, and that the principal ratifies the promises which he makes (*z*); neither does the implied authority of a clerk, shopman, or apprentice, to receive monies for his employer extend to transactions unconnected with the business in which he is employed (*a*). So a clerk who has authority to receive cash across the counter, has not on that account any authority by implication to receive payments by cheque by post (*b*), or to abslove

(*t*) Long *v.* Horne, 1 C. & P. 610. Winkfield *v.* Packington, 2 C. & P. 599.

(*u*) Rimmell *v.* Sampayo, 1 C. & P. 254; infra, p. 43.

(*x*) Precious *v.* Abel, 1 Esp. 350; infra, p. 43.

(*z*) Olive *v.* Eames, 2 Stark. 182.

(*a*) Sanderson *v.* Bell, 2 Crom. & M. 312.

(*b*) Kaye *v.* Brett, 5 Ex. 269.

the debtor by allowing him to set off the debt due to his master against a debt due from himself to his master's debtor (*c*). Where a clerk or traveller has authority to obtain orders, he has not of necessity any authority to receive payment for them, and if, having no such authority, he does in fact receive payment, such payment does not absolve the debtor, but the debtor must still pay the master, if the servant embezzle or retain the money so received (*d*). Nor are a servant's declarations evidence against his master, unless made in the course of the business in which he is employed (*e*). In the ordinary case of sending a servant to buy goods, without previously furnishing him with money to pay for them, a necessarily implied authority is thereby given to the servant to pledge his master's credit; and upon the strength of this authority, not only will the master be liable for the goods so obtained, notwithstanding his having afterwards sent the servant with the money to pay for the same, if in fact it be not paid over to the tradesman, but also for any other goods, which may subsequently be obtained by such servant upon his master's credit; whether he may have been sent with the money to pay for the same, and have embezzled it, or may have surreptitiously obtained the things for his own use (*f*). Proof of payment by the master, on a former occasion, for goods obtained upon his credit by the servant, will of itself be sufficient evidence of the servant having an authority to pledge his master's credit, to render the latter liable for any others, subsequently obtained by such servant upon credit (*g*); even after being discharged from his situation (*h*); unless it can be shown that the tradesman was aware, at the time, that the servant had not any such authority, or that he had been discharged. However,

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(*c*) Sweeting *v.* Pearce, 30 L. J. C. P. 109.

(*d*) Puttock *v.* Warr, 31 L. T. 86. Howard *v.* Chapman, 4 C. & P. 508, *post*. Pole *v.* Leask, 29 L. J ch. 893.

(*e*) Garth *v.* Howard, 8 Bing. 451. Great Western Railway Company *v.* Willis, 34 L. J. C. P. 195.

(*f*) Hazard *v.* Treadwell, 1 Stra. 506. Bolton *v.* Hillersden, 1 Ld. Raym. 225. Southby *v.* Wiseman, 3 Keb. 625. Precious *v.* Abel, 1 Esp. 350. Aishcome *v.* Hd. Spelholme, Holt, 460. Rusby *v.* Scarlett, 5 Esp. 76. Miller *v.* Hamilton, 5 Car. & P. 433.

(*g*) Hazard *v.* Treadwell, ubi. sup.

(*h*) Nickson *v.* Brohan, 10 Mod. 110. ——— *v.* Harrison, Holt, 460.

where the servant is always sent with ready money, no such implication will arise, and the creditor must look for payment to the servant, and not to the master (*i*). In *Rusby* v. *Scarlett*, the case turned entirely upon this point; the circumstances were these:—The master was in the habit of giving money to his servant for the purpose of paying for the various things required for housekeeping, &c.; the servant bought goods of the plaintiff, who was wholly unknown to the master, upon credit, and charged the amount to his master, but never paid the tradesman. The master having refused to pay, the plaintiff brought an action against him, and on the trial it was held by Lord Ellenborough, C. J., to be material in that case, to see when the money was given, because, if the servant was always in cash beforehand to pay for the goods, the master was not liable, as he never authorized him to pledge his credit: but if the servant was not so in cash, he gave him a right to take up the things on credit, and would be liable as the servant had not paid the plaintiff, though he might have received the money from the defendant, his master. In all these cases of implied authority, everything turns upon the ordinary course of dealing adopted between the parties, and, therefore, if a person in the habit of taking in goods upon credit, and from time to time paying the creditor for them, afterwards resolve to discontiuue taking credit, and to pay ready money for the things on delivery, and so inform the creditor's servant, who delivers them: this is not sufficient; but the buyer must give notice to the seller, of the intended alteration in the course of dealing, and, until such notice, he will continue liable to the master, notwithstanding payment to the servant, should the latter make away with the money (*k*). Upon the same principle, where a servant in the habit of receiving money for her master, is in the habit of paying over the same to him, without any vouchers passing between them, if the master seek to charge her with not having paid over any of the money, the onus of such proof will be entirely upon him (*l*); he, by the course of

(*i*) Kendal *v.* Andrews, Esp. Dig. 115. Stubbing *v.* Heintz, Peake, 47. Rusby *v.* Scarlett, 5 Esp. 76.

(*k*) Gratland *v.* Freeman, 3 Esp. 85.

(*l*) Evans *v.* Birch, 3 Camp. 10.

dealing btween them, having put it out of the power of his servant to show that she had paid.

In the absence of either an express or implied authority, as above mentioned, a master will not be bound by the contract of his servant (*m*). Thus, if a servant without authority so to do, pledge his master's goods, no property in them is passed to the pledgee, nor are any rights conferred on him as against the master, or if a servant sent to receive money, take a bill instead, and give a receipt, the master will not be bound by such receipt, unless the bill be paid (*n*); nor will a master be bound by the receipt of his servant, unless expressly authorized to receive the money, or unless it can be implied from former occasions (*o*); and so, although a traveller, who takes orders for goods from his employer's customer in the country, has authority to receive payment for them in money, he cannot take other goods in lieu (*p*); or, if a servant employed to keep the master's shop, or to sell for him, give away his master's goods, the latter may maintain an action against the receiver (*q*). It has also been determined (*r*) that the implied authority of an apprentice, or shopman, to receive monies for his employer does not extend to matters unconnected with his business; and that the statements of a shopman, or other servant, are not evidence against his master, unless made in the course of the transaction giving rise to the particular question (*s*). And where a butler ordered spirituous liquors in the name of, but not in truth for, his master, it was determined that the tradesman could not recover against the master, unless he had previously paid for goods so ordered, or it could be shown that the butler had been authorized to order those in question (*t*). Although a master, in the habit of paying for goods taken in upon credit by

(*m*) Nickson *v.* Brohan, 10 Mod. 110. Stubbing *v.* Heintz, Peake, 47. Fenn *v.* Harrison, 3 T. R. 760.

(*n*) Ward *v.* Evans, 2 Salk. 442. 6 Mod. 36, S. C. Lamb *v.* Attenborough, 31 L. J. Q. B. 41. Fuentes *v.* Montis, 37 L. J. C. P. 137.

(*o*) Thorold *v.* Smith, 11 Mod. 87, 88; Holt, 402, 3. Sanderson *v.* Bell, 2 Cr. & M. 312. Kaye *v.* Brett, 5 Exch. Rep. 269.

(*p*) Howard *v.* Chapman, 4 C. & P. 508. Tindal, C. J.

(*q*) Noy's Max. 94. Kitch. 371.

(*r*) Sanderson *v.* Bell, ubi sup.

(*s*) Garth *v.* Howard, 10 Law J. R. 129, c. b.; 8 Bing. 451.

(*t*) Maunder *v.* Conyers, 2 Stark, 281.

his servants for the use of the family, will, *primâ facie*, be liable for any others so taken in, though in truth not for his use; yet, where the master was in the habit of paying for a given quantity, but the servant clandestinely took in more, it was held, that the master's being in the habit of paying regularly for some of the goods, was sufficient to put the tradesman on his guard, and make it incumbent on him to ascertain, whether, or not, the rest were for the master's use; and, not being so, that he was not liable (*u*). If a master having bought goods on credit, gives to his servant money to pay the amounts due, and the servant retain or embezzle the money, the master is still liable to his creditors for the amount, and must bear the loss occasioned by his servant's wrongful act (*x*). But where a tradesman had supplied the defendant's family with bread, of which weekly bills were delivered to his housekeeper (who had charged for the payment of the same in her accounts), and it appeared that the latter bills had been regularly paid, and receipted, but that the earlier had not, it was held that, in the absence of proof of the money having been given to the housekeeper to pay those bills with, the question of negligence on the part of the baker, in receipting the latter, and leaving the earlier bills unpaid, could not be raised (*y*). And so, although, generally speaking, a master will be liable for work done upon his property by the unauthorized orders of a servant, because in ordinary cases the master's authority may reasonably be implied, yet, it will be otherwise, if the work be done without either the knowledge or sanction of the master, and the tradesman have never been employed on any former occasion; thus, where a servant having broken his master's chaise, employed a tradesman to repair the same, who had never been employed on any occasion for the master, the latter being entirely ignorant of the circumstance, it was held that the tradesman was bound to deliver up the chaise to the master without being paid for the repairs (*z*). But

(*u*) Pearce *v.* Rogers, 3 Esp. 214.
(*x*) Heald *v.* Kenworthy, 10 Ex. 739.
(*y*) Miller *v.* Hamilton, 5 C. & P. 433.
(*z*) Hiscox *v.* Greenwood, 4 Esp. 174.

where, in an action for work done in shoeing and physicing the defendant's horse, the defence was, that the defendant, by an agreement with his groom allowed him five guineas per annum, for which he was to keep the horses properly shod, and furnish them with proper medicines when necessary, it was held by Lord Kenyon, C. J., that it was no defence to the action, unless the plaintiff knew of this agreement, and expressly trusted the groom: that if a servant buys things, which come to his master's use, the master should take care to see them paid for; for a tradesman has nothing to do with any private agreement between the master and servant; and a verdict was accordingly found for the plaintiff (*a*). Where a coachman went in his master's livery, and hired horses of a horse jobber, and they were accordingly sent, and used in his carriage, in an action against the master for the hire, the evidence was contradictory as to the tradesman's knowledge of a contract between the master and his servant for horsing the carriage, and as to the party to whom the credit was in fact given; and it was held by Littledale, J., that, if the coachman did not represent to the plaintiff the circumstance of the agreement between himself and his master, by the master's sending him forth into the world, wearing his livery, to hire horses, which he (the master) afterwards used, knowing of whom they were hired, and yet not sending to ascertain if his credit had been pledged for them, an implied authority was given, and the master was bound to pay for the hire; that this sort of bargain seemed to be unusual between a gentleman and his coachman, and ought not to prevent the plaintiff from having recourse to the master: a master might be prevented by business, or want of time, from making a bargain himself, and might send his servant; and, provided the business were within the regular department of the servant, the master would be clearly liable: but the jury, apparently considering that the plaintiff knew of the agreement with, and gave credit to, the servant, found a verdict for the defendant (*b*).

(*a*) Precious *v.* Abel, 1 Esp. 350.
(*b*) Rimmell *v.* Sampayo, 1 Car. & P. 254.

Where a servant was sent to a salesman with a load of hay to be disposed of on account of his employer, and the salesman, having accordingly sold it, ordered the servant to deliver it at the purchaser's, it was held that the salesman did not thereby adopt the servant as his agent, but that the servant still continued to act for the principal, so as to render the latter liable for a mistake in the delivery (*c*).

If a master gives notice to a tradesman that a servant, who formerly had authority to pledge his credit, has left his service, the tradesman cannot charge the master for goods supplied after the notice (*d*). A mere notice to the servant himself not to pledge his master's credit would not, however, relieve the master from liability, if the tradesman were ignorant of the revocation of authority (*e*). And the act of a servant, though discharged, may bind the master, if the person giving credit has no knowledge of the discharge (*f*). The death of the master operates as a revocation of the servant's authority (*g*).

A doubt seems to have been entertained on several occasions, whether a master is not bound to provide his domestic servant with medical attendance and medicine, in case of sickness; from the examination of the various cases, however, it appears he is not bound to do so. In this place, the question is only incidental to another, viz., how far the master is liable to the medical man employed by the servant, as upon an implied contract, for medicine and attendance upon him during his illness? If the master direct the doctor to attend the servant, there can be no doubt of his liability to pay, as even an entire stranger, desiring a surgeon to attend a poor person will be liable to pay him for his trouble (*h*). In the case of a yearly servant in husbandry, it has been determined that the master is bound to support him during the period of his hiring, notwithstanding his being disabled from labour by sickness (*i*); and so,

(*c*) Gingell *v.* Glasscock, 8 Bing. 86.

(*d*) Chappell *v.* Bray, 30 L. J. Ex. 24.

(*e*) Trueman *v.* Loder, 11 A. & E. 589. Aste *v.* Montague, 1 F. & F. 261.

(*f*) Monk *v.* Clayton, cited in Nickson *v.* Brohan, 10 Mod. 110.

(*g*) Blades *v.* Free, 9 B. & C. 167. Smout *v.* Ilbery, 10 M. & W. 1.

(*h*) Watling *v.* Walters, 1 C. & P. 132.

(*i*) Rex *v.* Wintersett, Cald. 298.

of a menial servant, there cannot be a doubt of the master's liability to maintain him in such case, until he might otherwise be lawfully discharged. It has been contended, in support of the liability of the master for medicine, that, under the implied contract on the part of the master, to supply his servant with proper food, the master impliedly contracts to provide medicine, as being the requisite and proper food in case of sickness: but this argument proceeds upon altogether false premises; it assumes that medicine is to the body in illness, what food is, in health, viz., a source of nourishment, but it is not so; neither does it serve as a substitute for it; and, therefore, if the master's implied contract do include the providing of medicine, it must be in addition to food.

Where a farmer's servant whilst attending his master's waggon had broken his leg, it was held that the master was not liable to reimburse the parish for medicines supplied to the servant: and Lord Mansfield said, "There "is, in point of law, no action against the master to "compel him to repay the parish for the cure of his "servant; no authority has been cited, but it seems to "me that it cannot be; the parish is bound to take "care of accidents" (*k*). In a case (*l*), where an action had been brought for medical attendance by the plaintiff upon the defendant's servant, who had broken his arm whilst driving the defendant's team, and who had been hired at the yearly wages of 3*l.* 10*s.* and his victuals, Le Blanc, J., nonsuited the plaintiff, on the ground that the defendant, not having employed him, nor made any promise of payment, was not liable. On discharging a rule *nisi* to set aside the nonsuit, the several judges delivered opinions approving of the ruling of Le Blanc, J.

Where the master had called in a medical man to attend his servant, and sought to deduct the amount of his charge out of her wages, which it was decided he could not do, Gaselee, J., observed, "I am not pre-"pared to say, that a master is bound to provide a

(*k*) Newby *v.* Wiltshire, 2 Esp. 739. Wing *v.* Mill, 1 B. & Ald. 104 Lamb *v.* Bunce, 4 M. & S. 275.

(*l*) Wennall *v.* Adney, 3 B. & P. 247.

" menial servant with medicines; with respect to some " other servants, he clearly is not so: however, though " it is often done by masters for their menial servants, " I do not think I should be authorized in saying, that " they are bound so to do" (*m*). The following case may at first sight appear to be at variance with the decisions on this subject, but is not so when fully considered.—In an action for medical attendance on the defendant and his family, it appeared that the defendant and his wife resided at a distance of about a mile and a half from a house, in which their younger children were living under the charge of Susan Parry, who had acted as wet nurse to two of their youngest children; the defendant's wife was in the habit of going to see the children three or four times a week; but it did not appear when the defendant was at the house; Susan Parry was taken ill in consequence of suckling the youngest of such children, and was attended for this complaint by the plaintiff, who was unknown to the defendant, a Mr. Berry being the surgeon who regularly attended his family; the defendant, hearing of Susan Parry's illness, desired Mr. Berry to see her, and sent her 10*s.* to pay for medicine, as Mr. Berry was a consulting surgeon; the defendant's wife knew of the plaintiff's attendance on Susan Parry, and did not express any disapprobation of it. Mr. Justice Taunton, before whom the cause was tried, is thus reported to have drawn his conclusion:—" With respect to that part of the [plaintiff's] " bill, which relates to the attendance on Susan Parry, " it appears that her illness arose in the defendant's " service, and that the defendant was informed of it, " and that he sent Mr. Berry to see her. This shows " that he considered himself liable to take care of her " in this illness; and it is also shown that his wife " knew, and did not disapprove, of the plaintiff's " attendance; and, I think, it must be taken that the " defendant's wife had the general superintendence of " this house. It therefore appears to me that, for this " part of the charge, the defendant is liable." There

(*m*) Sellen *v.* Norman, 4 Car. & P. 80.

was also a charge of 7*s.* 6*d.* for attending another servant of the defendant, who had hurt her ankle in getting over a gate; as to which his lordship said,— "As to the charge of 7*s.* 6*d.* for attending Ellen Read, "it appears to me that the plaintiff has not made out "his case; she got the hurt in getting over a gate, and "the plaintiff, who was not the regular medical man of "the family, did not attend her by the desire of the "defendant, or his wife; and for anything that appears, "it might even have been without the knowledge of "the defendant, or his wife." It will be seen that the master's liability to provide medical attendance and medicine for his servant is expressly denied, by the learned judge who tried the case, as far as related to Ellen Read; but it was observed that, with respect to Susan Parry, there were circumstances from which a contract to supply her with such attendance and medicine might be implied, and that, therefore, as far as related to the plaintiff's claim for his attendance upon Susan Parry, the defendant was liable.

It may therefore be stated generally, that a master is not liable to provide a domestic servant with medical attendance and medicine in case of sickness, unless he has expressly contracted to do so, or from any circumstances a contract can be implied that he should supply such medical assistance as may at any time be necessary. In the case of a servant in husbandry requiring medical aid, it appears that the overseers of the poor of the parish, in which he may be legally settled at the time, are liable for such medical attendance and medicine as may have been supplied (*n*), and consequently that the employer of such a servant would rarely be presumed to have rendered himself liable for such attendance and medicine, though it cannot be doubted that in this respect the same rule would apply as in the case of domestic servants, viz., that the employer may by express contract with the medical man become responsible for the expenses incurred, or he may by an express or implied contract with the servant be presumed to have authorized him to incur expenses for

(*n*) Watson *v.* Turner, Bull. N. P. 147.

such medical attendance as may become requisite. That the overseers of the poor are liable is now well established; thus, where a farmer's servant, being run over by his master's waggon in the parish of A., and being much bruised, and his leg broken, was carried to the next house, which happened to be a public house in the adjoining parish of B, where he was attended by the plaintiff, a surgeon, who was generally employed to attend the poor of B., and during two months' attendance the defendant, one of the overseers of the poor of B., frequently visited the servant, and when he was cured took him in a cart to his master's: the court held, that as the servant was casual poor in B. it was the legal duty of the parish officers there to provide him with medical attendance; and as the defendant stood by and saw that duty performed by the plaintiff without objecting to it, the law would imply a promise to pay for it(*o*). The case of seamen who may become sick during the progress of a voyage is specially provided for by stat. 17 & 18 Vict. c. 104, s. 234.

There is, however, in the case of an apprentice a duty on the part of the master to provide him with proper medicines in case of illness, and in this respect a distinction has been made between a mere servant and an apprentice(*p*). This liability may, however, be controlled by an express covenant in the indenture of apprenticeship.

V.—OF THE RIGHTS OF THE SERVANT OTHER THAN TO WAGES, WARNING, OR CHARACTER.

Having in the last Chapter, in discussing the question of the liability of the master to find his domestic servant in medicine and medical attendance, inferentially examined the right of the latter to call upon the former to provide the same, it does not seem requisite

(*o*) Lamb *v.* Bunce, 4 M. & S. 275; et vide Wing *v.* Mill, 1 B. & Ald. 104.

(*p*) Reg. *v.* W. Smith, 8 Car. & P. 153.

to do more here than to state, as the conclusion drawn from a consideration of the several cases on the subject, that the servant has no such right, unless stipulated for on the contract of hiring; but must be dependent for assistance, in case of sickness, upon the humanity and kindness of his master; or may resort to overseers of the parish in which he is legally settled for assistance.

A servant may lawfully assault a person in the defence of his master (*r*), provided the attack upon the master be illegal, it being part of his duty for which he receives his wages to stand by and defend his master. A master may correct and punish his apprentice in a reasonable manner for abusive language, neglect of duty, &c. (*s*). A menial servant however, would be justified in quitting his master's service instantly upon even a moderate castigation, and if he also brought an action for the assault, a jury would probably think him entitled to heavy damages. A master would also render himself liable to proceedings before a magistrate for breach of the peace, or to an indictment.

Where the master agrees to provide a livery, or other dress of that description, the servant does not thereby become entitled to the dress itself, but merely to a qualified use of it during his service, and on leaving must deliver it up, unless the contrary have been expressly stipulated between the parties (*t*).

There is no legal objection to a servant, pending his employment, soliciting business from his master's customers for himself, so soon as he shall have quitted his service, and gone into business upon his own account, so long as he does not neglect his master's business by occupying time, which belongs to his master, and is required by the exigencies of his master's business, in such solicitation; and where loss to the master is apprehended from such a course, the servant may be, and

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(*r*) Bac. Abr. tit. "Master and Servant," P. 2 Rol. Abr. 546. Leeward *v.* Basilee, 1 Salk, 407.

(*s*) Penn *v.* Ward, 2 C. M. & R. 338. Gylbert *v.* Fletcher, Cro. Car. 179. Winstone *v.* Linn, 1 B. & C. 469.

(*t*) Croker *v.* Molyneux, 3 Car. & P. 470.

frequently is, restrained by contract from so doing, and from setting up within a certain distance of the master's place of business (*u*).. It must, however, be borne in mind that contracts in restraint of trade are void, except where the restraint is partial (*x*). A restriction from trading, unlimited as to space, and limited only as to time, has been held bad (*z*); but on the other hand, a contract in restraint of trade, limited as to distance, but not as to time, has been held good (*a*). A covenant not to carry on a particular trade within the cities of London and Westminster, or within the distance of 600 miles from the same, was held divisible, and though void as to the 600 miles, it was held that the covenantee might maintain an action for damages occasioned by a breach in carrying on the prohibited trade in the city of London (*b*).

The relation between a master and his servant in all matters connected with, or arising out of, the service, is regulated by the contract of service, and consequently the master is not liable for any injury which may happen to the servant in the course of the service, unless such liability is imposed upon the master, either expressly, or impliedly, by the terms of the contract. It is held that the master does not impliedly warrant to the servant the soundness or sufficiency of the tackle with which he is to work (*c*), but if the servant be induced to work with insufficient and unsafe tackle, by the misrepresentations of the master as to its safety, or if the master is personally aware of its unsafe condition and neglects to inform a servant thereof, who is unaware of it and unable to judge of it, he becomes liable for injuries happening to the servant by reason of such condition of the tackle (*d*). The master is not liable to his servant

(*u*) Nichol *v.* Martyn, 2 Esp. 732.
(*x*) Mitchell *v.* Reynolds, 1 Smith's L. C. 171. Pilkington *v.* Scott, 15 M. & W. 659.
(*z*) Hitchcok *v.* Coker, 6 A. & E. 438. Ward *v.* Byrne, 5 M. & W. 548. Procter *v.* Sargent, 2 M. & G. 20. Rannie *v.* Irvine, 7 M. & G. 969; 8 Scott's N. R. 674, S. C.
(*a*) Pemberton *v.* Vaughan, 10 Q. B. Rep. 87. Sainter *v.* Ferguson, 7 C. B. Rep. 716. Elves *v.* Crofts, 10 C. B. Rep. 241.
(*b*) Mallan *v.* May, 11 M. & W. 653. Price *v.* Green, 16 M. & W. 346.
(*c*) Ormond *v.* Holland, E. B. & E. 102. Couch *v.* Steel, 3 E. & B. 402. Shearman and Redfield on Negligence, p. 111.
(*d*) Wilson *v.* Merry, L. R. 1 H. & L. Sc. Ap. 332. Patterson *v.* Wallace, 1 Macq. 751. Brydon *v.* Stewart, 2 Macq. 30. Webb *v.* Rennie, 4 F. & F. 608.

unless there be negligence on the part of the master in that which he, the master, has contracted or undertaken with his servant to do. He is held to undertake to use reasonable care in the selection of fellow servants, in the purchase, and in providing means of inspection and repair of tackle (*g*). If the master, by his own personal negligence, injure his servant, the fact of his being the master does not in any way exempt him from liability. It is the duty of the master to avoid exposing his servants, so far as he can, by the use of ordinary care, to extraordinary risks, which the servants could not foresee. In *Davies* v. *England*, the servant was employed to cut up the carcases of diseased cattle, he being unaware of the dangerous nature of the employment, whilst the master was aware of it, and he was thereby infected by disease; it was held, that he was entitled to recover damages against the master (*h*). If a servant enter upon a dangerous employment with a knowledge of its danger, or if such danger be so obvious that he ought to have known of it, the servant thereby takes the risk of the employment upon himself (*i*). If the danger is unknown to the master, and there is no negligence on his part, he is not responsible for injuries happening to his servant (*k*); as for instance, where the floor of a warehouse gave way and injured a servant who was working in the warehouse (*l*). The servant cannot recover from his master damages for injuries caused by the negligence of his fellow servants, unless, as we have seen, the master himself be negligent, either in the selection of incompetent persons, or in the retention of them after he is aware of their incompetence (*m*). In the case of *Priestly* v. *Fowler*, which is usually regarded as the leading case upon this branch of the law, the defendant had sent his servant, the plaintiff, to go

(*g*) Williams *v.* Clough, 3 H. & N. 258. Tarrant *v.* Webb, 18 C. B. 797. Mellors *v.* Shaw, 1 B. & S. 437, 444.

(*h*) Davies *v.* England, 33 L. J. Q. B. 321.

(*i*) Seymour *v.* Maddox, 16 Q. B. 332. Dynen *v.* Leach, 26 L. J. Ex. 221. Bolck *v.* Smith, 7 H. & N. 736; 31 Q. B. 201. Hoey *v.* Dublin, Rly. Co. L. R. 5 Ir. Com. Law. 206.

(*k*) Potts *v.* Carlisle Rly. Co. 2 L. T. (N. S.) 283. Brown *v.* Accrington Cotton Co., 34 L. J. Ex. 208.

(*l*) Brown *v.* Accrington Cotton Co., 34 L. J. Ex. 208.

(*m*) Tarrant *v.* Webb, 18 C. B. 805. Wilson *v.* Merry, L. R. 1 Sc. App. 326.

with certain goods of the defendant in his van, which was conducted by another of his servants, and which, from being overloaded, broke down; the plaintiff was thrown out and broke his thigh, and upon proof of these facts had recovered a verdict at the assizes. A rule to arrest the judgment having been obtained, and argued, the judgment of the court was thus delivered by Lord Abinger, C. B.:—"This was a motion in "arrest of judgment, after verdict for the plaintiff, "upon the insufficiency of the declaration. It has been "objected to this declaration, that it contains no "premises from which the duty of the defendant as "therein alleged, can be inferred in law; or, in "other words, that from the mere relation of master "and servant no contract, and therefore no duty, can "be implied on the part of the master to cause the "servant to be safely and securely carried, or to make "the master liable for damage to the servant, arising "from any vice or imperfection, unknown to the "master, in the carriage, or in the mode of loading "and conducting it. For, as the declaration contains "no charge that the defendant knew any of the defects "mentioned, the court is not called upon to decide "how far such knowledge on his part of a defect un-"known to the servant would make him liable. It is "admitted that there is no precedent for the present "action by a servant against a master. We are, there-"fore, to decide the question upon general principles, "and in doing so we are at liberty to look at the con-"sequences of a decision one way or the other. If the "master be liable to the servant in this action, the "principle of that liability will be found to carry us "to an alarming extent. He who is responsible by his "general duty, or by the terms of his contract, for all "the consequences of negligence in a matter in which "he is the principal, is responsible for the negligence of "all his inferior agents. If the owner of the carriage is "therefore responsible for the sufficiency of his car-"riage to his servant, he is responsible for the negli-"gence of his coach-maker, or his harness-maker, or "his coachman. The footman, therefore, who rides "behind the carriage, may have an action against his "master for a defect in the carriage owing to the neg-

" ligence of the coach-maker, or for a defect in the " harness arising from the negligence of the harness- " maker, or for drunkenness, neglect, or want of skill, " in the coachman; nor is there any reason why the " principle should not, if applicable in this class of " cases, extend to many others. The master, for " example, would be liable to the servant for the neg- " ligence of the chambermaid, for putting him into a " damp bed; for that of the upholsterer, for sending " in a crazy bedstead, whereby he was made to fall " down, while asleep, and injure himself; for the negli- " gence of the cook in not properly cleaning the copper " vessels used in the kitchen; of the butcher in sup- " plying the family with meat of a quality injurious to " the health; of the builder for a defect in the founda- " tion of the house, whereby it fell, and injured both " the master and the servant by the ruins. The incon- " venience, not to say the absurdity, of these conse- " quences, afford a sufficient argument against the " application of this principle to the present case. " But, in truth, the mere relation of the master and " the servant never can imply an obligation on the " part of the master to take more care of the servant " than he may reasonably be expected to do of himself. " He is, no doubt, bound to provide for the safety of " his servant in the course of his employment, to the " best of his judgment, information, and belief. The " servant is not bound to risk his safety in the service " of his master, and may, if he think fit, decline any " service in which he reasonably apprehends injury to " himself: and in most of the cases in which danger " may be incurred, if not in all, he is just as likely to " be acquainted with the probability and extent of it, " as the master. In that sort of employment, espe- " cially, which is described in the declaration in this " case, the plaintiff must have known as well as his " master, and probably better, whether the van was " sufficient, whether it was overloaded, and whether it " was likely to carry him safely. In fact, to allow " this sort of action to prevail would be an encourage- " ment to the servant to omit that diligence and cau- " tion which he is in duty bound to exercise on the " behalf of his master, to protect him against the mis-

" conduct or negligence of others who serve him, and " which diligence and caution, while they protect the " master, are a much better security against any injury " the servant may sustain by the negligence of others " engaged under the same master, than any recourse " against his master for damages could possibly afford. " We are therefore of opinion that the judgment ought " to be arrested." The rule was therefore made absolute (*n*). In addition to being servants of the same master, in order that the above rule may be applicable, they must be engaged in a common employment (*o*). A foreman is a fellow servant with those whom he superintends (*p*). In one case the plaintiff was in the employment of a railway company as a carpenter, to do any carpenter's work that might be required on the railway. He was standing on a scaffolding at work on a shed, close to the line, when some of the company's porters negligently shifted an engine on a turntable, so that it struck a ladder supporting a scaffold, by which means the plaintiff was thrown down and injured: it was held that the plaintiff and the porters were fellow servants, Erle, C. J., delivering the judgment as follows:—" There are many cases where the " immediate object on which the one servant is employed " is very dissimilar from that on which the other is em- " ployed, and yet the risk of injury from the negligence " of the one is so much a natural consequence of the " employment which the other accepts, that it must be " included in the risks that are to be considered in his " wages" (*q*). A guard of a train belonging to a railway company and a navvy carried in that train back to his home, at the end of his day's work, such carriage being not as a passenger but under the contract of service, were held to be fellow servants (*r*). A person who volunteers to assist a servant in his work is in no better position, with regard to rights of action against

(*n*) Priestley *v.* Fowler 3 M. & W. 1.

(*o*) Warburton *v.* G. W. Rly. Co., L. R. 2 Ex. 30. Bartonshill Coal Co. *v.* Reid, 3 Macq. 294, 307. Murray *v.* Currie, L. R. 6 C. P. 24.

(*p*) Gallagher *v.* Piper, 33 L. J. C. P. 335. Feltham *v.* England, L. R. 2 Q. B. 33.

(*q*) Morgan *v.* Vale of Neath Rly. Co., L. R. 1 Q. B. 149.

(*r*) Tunney *v.* Midland Rly. Co., L. R. 1 C. P. 291.

the master, than if he were a hired fellow servant to the servant whom he assists (*s*).

If the risks incurred in the course of the employment by the servant are obvious, whether arising from defective machinery, or the incompetency or insufficiency in numbers of his fellow workmen, and the servant, though he knows or ought to know of the risks, stops on in the service, he is guilty of such negligence contributing to his own injury, if an injury happen to him, as to disentitle him to recover compensation in an action against his master, even if, but for such stopping on, he would have had a right of action (*t*). Where the masters of a coal mine were aware that their servants habitually neglected to test a rope, which ought to have been tested, and a servant who was aware of this neglect, and was told by the servant in charge of the rope, that he had better examine it, was injured through the breaking of the rope, the masters were held not liable for the injury (*u*). Where a master expressly promises to the servant that he will repair the defect, or discharge the incompetent fellow workmen, as the case may be, the servant cannot be said to be guilty of negligence if he stop on in the service, for a short time, in reliance on the master's promise (*x*). In no case, however, where a plaintiff has been guilty of contributory negligence, can he recover damages, however negligent the defendant may have been. By contributory negligence is meant, negligence so conducing to the injury that, but for that negligence, the injury would not have happened, and such that the defendant could not, by ordinary care, have avoided the consequence of the negligence of the plaintiff (*z*).

A servant, it appears, is entitled to indemnification from his master for the consequences of an act done in

(*s*) Degg *v.* Midland Rly. Co., 1 H. & N. 773; 26 L. J. Ex. 171. Potter *v.* Faulkner, 31 L. J. Q. B. 30; 1 B. & S. 800.

(*t*) Senior *v.* Ward, 1 E. & E. 385. Skipp *v.* E. C. Rly. Co., 9 Ex. 223; 23 L. J. Ex. 23, followed in Saxton *v.* Hawksworth, Ex. Law Times, June 3rd, 1871. Griffiths *v.* Gidlow, 3 H. & N. 648.

(*u*) Senior *v.* Ward, 1 E. & E. 385.

(*x*) Clarke *v.* Holmes, 7 H. & N. 937 (Ex. Ch.) Holmes *v.* Clarke, 6 H. & N. 349. Patterson *v.* Wallace, 1 Macq. H. of L. 748.

(*z*) Davies *v.* Mann, 10 M. & W. 546. Tuff *v.* Warman, 5 C. B. N. S. 585. Greenland *v.* Chaplin, 5 Ex. 243, 247; 19 L. J. Ex. 293.

assertion of a supposed right on the part of the master, and in obedience to his orders, provided the same do not amount to a tort; but if it do, it is quite clear that he is not (*a*). If, however, there are circumstances from which it may be inferred that an employer caused his servant to believe that he was acting under an indemnity, he will be answerable to his servant for any damage he may have sustained through the act done, however tortious it may have been.

A servant, hired in the general way, has no right to call any portion of his time his own, but is bound to execute his master's commands at all reasonable times during the term of his hiring (*b*); and although a woman servant get married, she will be bound to serve till the hiring be determined, by efflux of time, or proper notice; and if she refuses to continue her service, her husband will be liable to the master for any damage he may have sustained through a breach of her contract of hiring and service.

Where the master agrees to find his servant in victuals, and fails in doing so, or only provides bad or insufficient food, the servant would of course be entitled to recover against the master for the breach of contract, and would be justified in leaving his service without notice (*c*); such a breach, however, would not authorize the servant to pledge his master's credit in order to obtain proper food.

By stat. 24 & 25 Vict. c. 100, s. 26, it is enacted, in order to protect servants, that "whosoever being legally liable either as a master or a mistress to provide for any apprentice, or servant, necessary food, clothing, or lodging, shall wilfully, and without lawful excuse, refuse or neglect to provide the same, or shall unlawfully or maliciously do or cause to be done, any bodily harm to any such apprentice or servant, so that the life of such apprentice or servant shall be endangered, or the health of such apprentice or servant shall have been or shall be likely to be permanently injured, shall be guilty of a misdemeanor, and being convicted

(*a*) Paddock *v.* Fradley, 1 C. & J. 90. Toplis *v.* Grane, 5 Bing. N. C. 636. Hart *v.* Leach, 1 M. & W. 560.

(*b*) Rex *v.* St. John, Devizes, 4 M. & R. 681; 9 B. & C. 900.

(*c*) Fitzherbert's Natura Brevium, 168.

thereof, shall be liable to penal servitude for five years (*d*), or to be imprisoned for any time not exceeding two years, with or without hard labour.

If a servant whose period of service has expired, whether put an end to by notice, or by the master without notice, or on account of misconduct on the part of the servant, justifying the master in so putting an end to it, or otherwise, refuses to quit his master's premises on being requested so to do, the master may eject him by force, but he must use no more force or violence than is absolutely necessary (*e*). In the case of a servant to a partnership firm being dismissed by one of the partners, but authorized to remain upon the partnership premises by another, the authority of that other is sufficient to justify the servant in remaining upon the premises, and to render the one partner liable in trespass if he attempt by force to remove such servant (*f*).

VI.—OF THE LIABILITY OF THE SERVANT.

1*st*. *To his Master for Negligence or Misconduct.*
2*nd*. *To Strangers.*
3*rd*. *Criminally.*

1. A servant in the performance of his duties is bound to exercise reasonable care and diligence, and to look with vigilance to his master's interests: and if the master sustain damage in consequence of his doing anything prohibited by law, or of his gross negligence or folly, the servant may be called upon to make good the loss; and so, if he do not adhere to the reasonable orders and instructions of his master, and a loss be sustained through his deviating from them,

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(*d*) 27 & 28 Vict. c. 47, s. 2.
(*e*) Donaldson *v.* Williams, 1 Cr. & M. 345. Mackay *v.* Ford, 29 L. J. Ex. 404.
(*f*) Donaldson *v.* Williams, *supra*.

though done with a view to the master's benefit; but where the loss happens from mere accident, and without negligence on the part of the servant, he will not be responsible (*g*).

Where goods entrusted to a servant have been accidentally lost or damaged by him, he will not be liable for the same, unless negligence also be proved (*h*): nor, even then, can the master retain the amount of the value of the damage out of the servant's wages, unless there has been a stipulation to that effect in the contract of hiring (*i*).

It is the duty of a steward, clerk, or other person, employed to receive and pay money for a principal, to keep and render true and explicit accounts and vouchers (*k*); and it has been held that a steward is bound to account periodically, although not called upon to do so, and if through lapse of time, he should afterwards be unable to vouch his accounts, he must bear the loss, as a consequence of his own negligence; and the Court of Chancery will not assist him (*l*).

In regard to such tortious acts of the servant as would, if committed by a stranger, give the master a right of action for trespass; it may be observed that there is nothing in the relation of master and servant to interfere with the master's right of action against a servant, for any damage he may have sustained by reason of a trespass committed by his servant. If the trespass be personal, and amount to a breach of the peace, the master would be justified in giving the servant into the custody of the police. Thus, where a servant in the house of his master, at a late hour of the night, was violent in his manner, and made a great noise and abused his master, and laid hold of him, and a struggle ensued, the master was held justified in giving the servant into the custody of a policeman, to be dealt with according to law (*m*).

(*g*) Hussey *v.* Pusey, 1 Sid. 298. 5 Rep. 14. 1 Leon. 88. Moor, 244. Kilsby *v.* Williams 5 B. & A. 820. Catlin *v.* Bell, 4 Camp 183. Priestly *v.* Fowler, 3 Mees. & W. 7.

(*h*) Savage *v.* Walthew, 11 Mod. 135. Nickson *v.* Brohan, 10 Mod. 110. Walker *v.* Guarantee Association, 18 Q. B. 277.

(*i*) Le Loir *v.* Bristow, 4 Camp. 134.

(*k*) Jenkins *v.* Gould, 3 Russ. 385.

(*l*) Ormond (Lady) *v.* Hutchinson, 13 Ves. 53, 92.

(*m*) Shaw *v.* Charittie, 3 Car & K. 21.

2. A servant, as well as the master, is responsible to the injured party for any act done by him, though by command of his master, if it amount to a trespass (*m*); or if there be a conversion by the servant, that is a dealing with the property, or refusal to deliver it up on demand, and this solely for the master's benefit (*n*). Thus, where a servant received a bill of exchange from the holder, knowing it to be in his hands for the purpose of getting it discounted, and appropriated it to the payment of a debt due from such holder to his master, the servant was held liable to the owner of the bill for such conversion (*o*); and so, where a traveller received goods from a person, who had committed an act of bankruptcy, and sold them for the benefit of his employer (*p*): and it will not avail the servant that he acted in pursuance of his master's orders, if the master himself had no authority to do the act complained of, or to direct it to be done (*q*). However, a servant will not be liable for improperly intermeddling with another's goods, by command of his master, if it do not amount to a trespass, or conversion (*r*).

A servant is not liable for goods obtained by him upon the credit of his master (to whom alone the creditor can look for payment) (*s*); but if he pledge his master's credit without having any authority so to do, he is liable to the party injured by such wrongful assumption of authority (*t*). For a mere nonfeasance or omission to perform a duty incumbent upon him by reason of his position as servant, he is liable only to his master (*u*), but where the servant is a tort feasor, and commits acts of misfeasance, no authority he can derive from his master can excuse him, against third parties, injured by him (*x*).

(*m*) Nalsh *v.* E. I. Co., Com. 469. Kingston *v.* Booth, Skin 228. Sands *v.* Child, 3 Lev. 351.

(*n*) Cary *v.* Webster, 1 Stra. 480, Cowp. 566, 806. Greenway *v.* Fisher, 1 C. & P. 190. Abbott, C. J.

(*o*) Cranch *v.* White, 1 Scott, 314; 1 Hodges, 61.

(*p*) Perkins *v.* Smith, Say. 42; 12 Mod. 4881; Wils. 328.

(*q*) Calcraft *v.* Gibbs, 5 T. R. 19. Stephens *v.* Elwal, 4 M. & S. 259. Sands *v.* Child, ubi sup.

(*r*) Mires *v.* Solebay, 2 Mod. 242. Alexander *v.* Southey, 5 B. & Ald. 247.

(*s*) Grylls *v.* Davies, 2 B. & Ad. 514.

(*t*) Randall *v.* Trimmen, 18 C. B. 786; 25 L. J. C. P. 307. Collen *v.* Wright, 8 E. & B. 647; 27 L. J. Q. B. 215 (Ex. Ch.)

(*u*) Lane *v.* Cotton, 12 Mod. 488. Savage *v.* Walthew, 11 Mod. 135. Nickson *v.* Brohan, 10 Mod. 111. Croft *v.* Alison, 4 B. & A. 590. Williams *v.* Cranston, 2 Stark. 82. M'Manus *v.* Crickett, 1 East, 106. Perkins *v.* Smith, 1 Wils. 328.

(*x*) Butler *v.* Basing, 2 C. & P. 613.

Where money is paid to a servant for the use of his employer, by mistake, he will not be liable to refund it, if he have actually paid it over to, or made payments, or incurred liabilities, in consequence, on account of his principal; but merely giving credit for it in account will not be equivalent to payment over, and he will in such case be accountable for it to the party so paying by mistake (*y*): and to make it a defence for a servant, that he has paid over the money, it is necessary that it should have been paid to him expressly for the use of the person to whom he has so paid it over (*z*). To support an action, however, against the agent, or servant, to recover back the money, as money had and received to the use of the plaintiff, a receipt signed by the agent "for" the principal, will not be sufficient, such receipt being only evidence of a payment to the principal by the hands of his agent (*a*). And where money was received by a clerk to an attorney, who was authorized to receive it for his client, the clerk signing the receipt "for" the attorney, it was held that there was no privity between the clerk and the client; that the money was received by the clerk as the agent of the attorney, to whom alone he was accountable, and who was answerable on the other hand to his client; and that an action, therefore, would not lie against the clerk, at the suit of the client, for money had and received to his use (*b*). Neither will an action lie against a servant at the suit of a creditor, for money placed in his hands by his master for the purpose of being paid over to such creditor, but withheld; as the money is only received by the servant in that capacity (*c*).

For wanton acts, or such as clearly are not done in his capacity of servant, the servant, and not the master, will alone be responsible (*d*); as where a coachman wilfully drove his coach against, and injured, another (*e*);

(*y*) Buller *v.* Harrison, Cowp. 566, 806. Cox *v.* Prentice, 3 M. & S. 344.

(*z*) Snowdon *v.* Davis, 1 Taunt. 359.

(*a*) Edden *v.* Read, 3 Camp. 339.

(*b*) Stephens *v.* Badcock, 3 B. & Ad. 354.

(*c*) Howell *v.* Batt, 2 Nev. & M. 381.

(*d*) Naish *v.* E. I. Co., Com. 469. Kingston *v* Booth, Skin. 228. Croft *v.* Alison, 4 B. & A. 590. Bowcher *v.* Noidstrom, 1 Taunt. 568.

(*e*) M'Manus *v.* Crickett, 1 East, 106.

or, as where a parcel was given to a waggoner to be carried for his own gain, and not for the benefit of his master, and the same was lost (*f*).

3. With respect to criminal acts with regard to strangers, a servant stands on precisely the same footing as any other person. But with respect to criminal acts with regard to his master, in addition to the ordinary criminal law, there are various enactments.

Larceny by servant.] Whosoever, being a clerk or servant or being employed for the purpose or in the capacity of a clerk or servant, shall steal any chattel, money, or valuable security belonging to or in the possession or power of his master or employer, shall be guilty of felony, and being convicted thereof shall be liable at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than five years (27 & 28 Vict. c. 47, s. 2), or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and if a male under the age of sixteen years, with or without whipping (*g*).

Embezzlement by clerks or servants.] Whosoever, being a clerk or servant, or being employed for the purpose, or in the capacity of a clerk or servant, shall fraudulently embezzle any chattel or money, or valuable security, which shall be delivered to or received or taken into possession by him for or in the name of or on the account of his master or employer, or any part thereof, shall be deemed to have feloniously stolen the same from his master or employer, although such chattel, money, or security was not received into the possession of such master or employer otherwise than by the actual possession of his clerk, servant, or other person so employed, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than five years (27 & 28 Vict. c. 47, s. 2), or to be imprisoned for any term not exceeding two years, with or without hard labour and with or

(*f*) Butler v. Basing, 2 C. & P. 613. (*g*) 24 & 25 Vict. c. 96, s. 67.

without solitary confinement, and if a male under the age of sixteen years, with or without whipping (*h*).

Distinct acts of embezzlement may be charged in the same indictment.] It shall be lawful to charge in the indictment and proceed against the offender for any number of distinct acts of embezzlement, or of fraudulent application or disposition, not exceeding three, which may have been committed by him against the same master or employer, within the space of six months from the first to the last of such acts (*i*).

Goods of the master appropriated by the servant must still be in the constructive possession of the master, in order to make the appropriation by the servant amount to larceny. And if they have been in the actual possession of the master, and have been by him, or by his orders, delivered to the servant, they are considered to be in the constructive possession of the master. But if the goods or money have never been in the master's actual possession, but have been delivered to the servant by a third party, they will not be considered in the constructive possession of the master, and the offence will not be larceny but embezzlement. The distinction, however, between larceny and embezzlement is not so important as it was formerly, since now a person indicted for the one offence can be convicted of the other (*k*), but still he must be convicted of the right offence, as a jury has no power to find a prisoner guilty of one offence upon facts which prove another (*l*).

It is frequently important in cases under the statute to determine whether the prisoner is a clerk or servant within the meaning of the Act. The following decisions have been given on this point:—A female servant is within the statute (*m*); so is an apprentice (*n*) or a clerk to a corporation or company, though not appointed under the common seal (*o*); or a person who acted for many years for the overseers of a parish, at a yearly salary, under the name of their accountant and treasurer, and who received and paid all monies receivable

(*h*) 24 & 25 Vict. c. 96, s. 68.
(*i*) Id. s. 71.
(*k*) Id. s. 72.
(*l*) R. v. Gorbutt, D. & B. C. C. 166; 26 L. J. M. C. 47.
(*m*) R. v. Smith Russ. & Ry. 267.
(*n*) R. v. Mellish, Russ. & Ry. 80.
(*o*) R. v. Beacall, 1 C. & P. 457.

or payable by them, rendering to them a weekly account (*p*). A drover keeping cattle for a farmer at Smithfield, who was ordered to drive the cattle to the purchaser, and to receive the money, and having done so, appropriated the money, was held to be acting as a servant of the farmer and to have been rightly convicted of embezzlement (*q*).

Where a defendant, who was employed as a master of a barge to carry out and sell coals, and was allowed a portion of the profits, after deducting the price of the coals at the colliery, for his labour, took a quantity of coals and sold them, and received the price, and absconded with the money, and was convicted of embezzlement; it was held that the conviction was right (*r*). Where the prisoner was employed as a traveller to take orders and to collect money, and was paid by a percentage, and was employed as traveller by other persons in addition to the prosecutor, it was held that he was acting as clerk or servant to the prosecutor, within the Act (*s*). So the cashier of a firm who had, in addition to his salary, a percentage on the profits made by the firm, but who was not liable for its losses, and had no control over the business, was held to be within the Act (*t*). Where the prisoner was a carrier, whose only employment was to carry unsewed gloves from a glove manufacturer at one place to the glove sewers at another, and then to carry them back again when sewed, and to receive the money for the work, and pay it to the glove sewers, deducting the charge for carriage, it was held that he was not the glove sewers' servant, so as to be guilty of embezzlement in appropriating money so received by him (*u*). It would seem that where a servant is at liberty to serve or not as he pleases, receiving payment only for what he actually does, as, for instance, by commission on the amount of sales, the relationship created is that of agent, and not that of clerk or servant, so that such

(*p*) R. *v.* Squires, 2 Stark. 349. R. *v.* Tyers, Russ. & Ry. 402. R. *v.* Ward, Gow. 168. R. *v.* Carpenter, L. R. 1 C. C. R. 29.

(*q*) R. *v.* Hughes, 1 Mood. C. C. 370.

(*r*) R. *v.* Hartley, R. & R. 139.

(*s*) R. *v.* Carr, R. & R. 198. R. *v.* Batty, 2 Mood. C. C. 257. R. *v.* Bayley, 26 L. J. M. C. 4.

(*t*) R. *v.* Macdonald, 31 L. J. M. C. 67.

(*u*) R. *v.* Gibbs, 24 L. J. M. C. 63.

person cannot be convicted of embezzlement. It was held that a person who was employed to get orders for goods and to receive payment for them, but who was at liberty to get the orders, and receive the money where and when he thought proper, and to dispose of his time as he thought best, being paid by a commission, was not within the statute (*v*). In a recent case the prisoner was a member of a co-partnership. It was his duty to receive money for the co-partnership, and once a week to render an account and pay over the gross amount received during the previous week. During each of three several weeks within six months the prisoner received various small sums and failed to account for them at the end of the week, or to pay over the gross amount. It was held that he might properly be charged with embezzling the weekly aggregates in one indictment; Cockburn, C. J., delivering the judgment of the Court for Crown Cases Reserved in these words:—"It is quite true that if a man receives a number of seperate sums and has to account for each of them separately, only three instances of failure to account can be proved under one indictment. Thus, if there were to be one accounting on Monday and one on Tuesday and one on Wednesday, and so on, only three defaults could be charged and proved; though, even in such a case, evidence of other instances might be given in order to show that the instances charged were not merely accidental, but that what was done was done intentionally and fraudulently. But here no difficulty of this nature arises. I agree that the prisoner might have been indicted for embezzling any of the separate small sums received by him. But it appears upon the case that it was his duty to receive the small sums from time to time, to send in weekly accounts every Tuesday, and every Tuesday to pay over the gross amount. It is true that each of the small sums received had to be accounted for; but he might well be charged with embezzling the aggregate amount. And the evidence of the individual items was admissible to show how this aggregate was made up" (*w*).

(*v*) R. *v.* Bowers, L. R. 1 C. C. R. 41. R. *v.* Walker, D. & B. C. C. 606. R. *v.* May, 30 L. J. M. C. 81. R. *v.* Mayle, 11 Cox C. C. 150. R. *v.* Marshall, 11 Cox C. C. 490.

(*w*) R. *v.* Balls, L. R. 1 C. C. R. 328.

VII.—ARREST FOR CRIMES, FALSE IMPRISONMENT AND MALICIOUS PROSECUTION.

A master stands in exactly the same position as regards his right to arrest his servant, and is subject to the same liabilities for so doing as any other person. A short chapter on this subject may, however, it is thought, be found useful.

All persons are justified in apprehending those who are found actually committing, or attempting to commit a felony, and they are justified in detaining persons so found until they can be brought before a magistrate (*a*). Any person found committing any offence punishable, either upon indictment, or upon summary conviction, by virtue of the Larceny Act, 24 & 25 Vict. c. 96, except the offence of angling in the daytime, may be immediately apprehended without a warrant, by any person, and forthwith taken, together with such property, if any, before some neighbouring justice of the peace, to be dealt with according to law, and if any credible witness shall prove upon oath, before a justice of the peace, a reasonable cause to suspect that any person has in his possession or on his premises any property whatsoever on or with respect to which any such offence shall have been committed, the justice may grant a warrant to search for such property, as in the case of stolen goods; and any person to whom property shall be offered, pawned, or delivered, if he shall have reasonable cause to suspect that any offence has been committed on or with respect to such property, is authorized, and, if in his power, is required to apprehend and forthwith to take before a justice of the peace the party offering the same, together with such property, to be dealt with according to law (*b*). By a subsequent section, persons *bonâ fide*, though mistakenly, acting or intending to act under the powers of

(*a*) R. v. Hunt, 1 Moo. C. C. 93. (*b*) 24 & 25 Vict. c. 96, s. 103.

the Act are entitled to a notice, one month at least, before an action can be brought against them for such conduct (*c*).

In cases of felony any person may, upon reasonable suspicion, apprehend the suspected party without a warrant. It is advisable, however, where it is possible, to obtain a warrant, because any apprehension without a warrant is an imprisonment, and unless the party apprehending, if a private citizen, is able to prove that a felony was committed, and that he had reasonable and probable cause for suspecting the person apprehended of having committed it, he will be liable to an action for false imprisonment (*d*). A police constable is justified in apprehending a person if he has reasonable and probable cause to believe a felony has been committed, and that the party apprehended committed it (*e*).

If the arrest be made under a warrant the only remedy that an innocent person has, is by action for a malicious prosecution, in which the onus of proving that the prosecutor acted maliciously, falsely, and without reasonable and probable cause, lies upon the party bringing the action (*f*); if, however, he gives *primâ facie* evidence of the falsity of the charge, and of the absence of reasonable and probable cause for the prosecution, the jury may, if they think fit, find the existence of malice, and in such case, unless the defendant satisfies them by evidence of the absence of malice, or establishes satisfactorily the presence of reasonable and probable cause for the prosecution, find a verdict for the plaintiff (*g*).

(*c*) 24 & 25 Vict. c. 96, s. 113. Chamberlain *v.* King, L. R. 6 C. P. 474. Herman *v.* Seneschal, 13 C. B. N. S. 392; 32 L. J. C. P. 43. Roberts *v.* Orchard, 2 H. & C. 769; 33 L. J. Ex. 65. Selmes *v.* Judge, L. R. 6 Q. B. 724. Hardwick *v.* Moss, 31 L. J. Ex. 207.

(*d*) Davis *v.* Russell, 5 Bing. 357. Allen *v.* Wright, 8 C. & P. 526.

(*e*) Marsh *v.* Loader, 14 C. B. N. S. 535. Beckwith *v.* Philby, 6 B. & C. 638.

(*f*) Henderson *v.* Midland Railway Company, 24 L. T. N. S. 881; 20 W. R. 23. Lister *v.* Perryman, L. R. 4 H. of L. 521, 542. Walker *v.* South Eastern Railway Company, L. R. 5 C. P. 640, 644. Purcell *v.* McNamara, 9 East 361.

(*g*) Burley *v.* Bethune, 5 Taunt, 583. Mitchell *v.* Jenkins, 5 B. & Ad. 588. Taylor *v.* Willans, 2 B. & Ad. 857 (Ex. Ch.); 6 Bing. 188. Henderson *v.* Midland Railway Company, 24 L. T. N. S. 881; 20 W. R. 23.

VIII.—OF DISCHARGE.

Under this head it is purposed to consider, as well the right of the servant to leave, as that of the master to dismiss him from his situation. Where the hiring is for a specific and definite period, the relation of master and servant ceases on the lapse of the time stipulated, without notice by either party being in the least requisite.

Where the hiring comes within the terms of a general hiring, and the servant is a domestic, either party may determine it at pleasure, by giving, and the other is entitled to have, a month's notice, or warning (*a*). The master, indeed, has the option of paying a month's wages in advance, in lieu of giving warning, if he think proper to avail himself of it (*b*). It was contended that a head gardener, hired by the year, who had a house to live in rent free, and other gardeners under him, could not be discharged until the end of the year; but the jury having found him to be a menial servant, the court held the verdict right, and that he was consequently liable to be dismissed on a month's notice (*c*). So, too, a huntsman is a menial servant, and is liable, in the absence of any express agreement to the contrary, to be dismissed at a month's warning, or with a month's wages in lieu of warning. So also is a person hired to assist in the garden and stables (*d*).

In the case of a clerk, or other servant of this superior class, employed on the terms of a general hiring, neither party alone has a right to determine the contract (except for misconduct) at any other period, than at the expiration of some current year; but the length of notice to be previously given is

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(*a*) Cutter *v.* Powell, 6 T. R. 326. Robinson *v.* Hindman, 3 Esp. 235; 2 Selw. N. P. 1032, S. C. Archard *v.* Horner, 3 C. & P. 349.

(*b*) Robinson *v.* Hindman, ubi sup.; 2 Selw. N. P. 1032. Fawcett *v.* Cash, 5 B. & Ad. 904. Beeston *v.* Collyer, 4 Bing. 309.

(*c*) Nowlan *v.* Ablett, 2 C. M. & R. 54.

(*d*) Nicoll *v.* Greaves, 17 C. B. N. S. 27; 33 L. J. C. P. 259. Johnson *v.* Blenkensopp, 5 Jur. 870.

nowhere laid down (*e*); three calendar months' notice, at all events, would be sufficient. In one case a governess was held not to be a domestic servant, nor as such liable to be discharged at a month's notice, and it was suggested that at all events she was entitled to three months' notice at the least (*f*). In an action by a commercial traveller for a wrongful dismissal before the expiration of a year, it was proved that by the usage of trade a yearly hiring of a person in such a capacity might be put an end to by three months' notice; and the contract to employ for a year, alleged in the declaration, was therefore held to be improperly alleged (*g*).

The notice need not be in writing: care, however, should be taken to be able to prove the fact of its having been given, in case it should become necessary to do so.

We now come to the cases, in which the one party, by some act of his own, dispenses with, or deprives himself of his right to notice from the other; in other words, the following are the exceptions to the preceding rules:—

To entitle a master to discharge a domestic servant without warning, there must be actual disobedience, or such absolute incapacity or want of skill as to render the servant entirely unable to perform the service for which he was hired and which he undertook to perform, or such improper conduct as affects the due control of the master over his domestic establishment; and, therefore, previous immorality, as having had an illegitimate child before the commencement of the service, would not be sufficient to justify an immediate dismissal on discovery of the fact (*h*); but it has been decided that the servant's being with child of a bastard would be so (*i*); and so, likewise, if a man servant assault his employer's female servant with intent to take

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(*e*) Beeston *v.* Collyer, 12 Moo. 552; 2 C. & P. 607. Huttman *v.* Bulnois, 2 C. & P. 510. Gandall *v.* Pontigny, 1 Stark. 198; 4 Camp. 375. Bayley *v.* Rimmell, 1 M. & W. 506. Williams *v.* Byrne, 2 Nev. & P. 139.

(*f*) Todd *v.* Kellage, 23 Law J. 1, Exch.

(*g*) Metsner *v.* Bolton, 9 Exch. Rep. 513.

(*h*) Rex *v.* Westmeon, Cald. 129. Andrews *v.* Garstin, 31 L. J. C. P. 15.

(*i*) Rex *v.* Brampton, Cald. 11.

liberties with her person (*a*); or, if a servant embezzle or make away with his master's property (*b*). So, also, if the servant refuse to obey his master's lawful commands within the scope of his duties, as where a master desired his farm servant to take his horse to the marsh, about a mile off, just before the servant's dinner time, and the servant refused to do so, until he had had his dinner; this was held to be good cause of dismissal (*c*). If a servant be generally negligent in his conduct, frequently absent when wanted, or often sleep out at night (*d*), or if he absent himself without leave (*e*), or be guilty of moral misconduct, wilful disobedience, or habitual neglect (*f*), his master would be justified in dismissing without notice. And so also the existence of criminal intercourse between servants (*g*), or the betrayal by a clerk of his master's secrets (*h*), have been considered good justification of dismissal. Where a servant was discharged for wilful disobedience of her master's order to stay in his house all night, the circumstances under which the discharge was made were held a sufficient justification, though it was said that there might be cases in which wilful disobedience of such an order would be justifiable, as where a servant apprehended danger to her life or violence to her person, or where from an infectious disorder raging in the house, the servant was compelled to go out for the preservation of her life; though it may admit of question if such instances of disobedience come within the rule, since the command of the master that a servant should stay in the house under such circumstances would not be lawful (*i*). The question in what case, and upon what grounds, an employer has the right to discharge a person employed by him has only been considered in modern times, and is not fully settled; if a servant conducts himself on all

(*a*) Atkin *v.* Acton, 4 C. & P. 208.
(*b*) Brown *v.* Croft, Chitt. Genl. Pr. 81; and see Rex *v.* Morfitt, R. & R. C. C. 307. Sup. p. 62.
(*c*) Spain *v.* Arnott, 2 Stark. 256. Amor *v.* Fearon, 9 A. & E. 548. Churchward *v.* Foster, 2 F. & F. 229.
(*d*) Robinson *v.* Hindman, 3 Esp. 235.
(*e*) Craufurd *v.* Reid, 1 Shaw, 124.
(*f*) Callo *v.* Brouncker, 4 Car. & P. 519.
(*g*) R. *v.* Welford, Cald. 57.
(*h*) Beeston *v.* Collyer, 2 Car. & P. 609.
(*i*) Turner *v.* Mason, 14 M. & W. 112.

occasions in a negligent and lazy spirit, his master would be justified in discharging him; thus, where in an action for a wrongful dismissal the defendant pleaded that the plaintiff did not, whilst in his the defendant's employ, use his best endeavours to promote his interests according to the terms of the agreement alleged in the declaration, it was held that the plea disclosed a good defence (*k*). A clerk employed by a company to enter proceedings in their minute book entered on the margin of the book a protest in his own name against a summons for appointing a successor to himself, and in an action for a wrongful dismissal, it was held that the jury were justified in finding this to be a sufficient cause of dismissal (*l*). So the making false entries and representations has been held a sufficient justification of a discharge of a clerk (*m*); and where a clerk retained at a yearly salary to manage a mercantile business declared that he was a partner, and that he would transact the business as such, it was held that his employer was justified in dismissing him immediately, although he had not committed any other act of misconduct, nor had he refused in terms to go on as clerk (*n*).

A servant or agent, while in his master's or principal's service, can undertake no employment hostile to the interest of his employer. If he does so, and receives remuneration for it, it affords good ground for his immediate discharge; neither can an agent act in the business of his agency for himself and his principal at the same time (*o*).

The wanton destruction, or injury, of the master's property, or that of others for which he would be responsible, would, it is presumed, be considered such a breach of the servant's duty as would entitle the master to discharge upon the instant: carelessness, however, even though gross, will not, neither will impertinence alone, be a sufficient justification for so

(*k*) Lomax *v.* Arding, 10 Exch. Rep. 734.
(*l*) Ridgway *v.* Hungerford Market Co., 3 A. & E. 171.
(*m*) Baillie *v.* Kell, 4 Bing. N. C. 638.
(*n*) Amor *v.* Fearon, 9 A. & E. 548.
(*o*) Morrison *v.* The Ogdensburgh Railway Company, 52 Barbour's Rep. of Sup. Court of New York, 179.

doing: but if the impertinence be accompanied by actual disobedience, or wilful, or habitual neglect of orders, there can be no doubt, nor, if it be to such a degree that no master could pass it over, and, at the same time, maintain a due and proper control over his domestic establishment, can there be much, but that warning might safely be dispensed with. In one case Lord Wensleydale said, "that for habitual neglect the defendant was at liberty to part with the plaintiff." If a servant pursues a course of conduct calculated seriously to injure his master in his business, the master is justified in dismissing him. Thus, the lessee of a theatre was held to be justified in dismissing a manager whose course of conduct was calculated seriously to injure the theatre (*a*).

As the exercise of this power of dismissal without notice is viewed as an act *strictissimi juris*, care should be taken that the misconduct complained of be either clearly within the letter of, or, at all events, within the principle apparently established by the foregoing decisions; that is, it is submitted, it must be, either immoral conduct, or misconduct directly affecting the proper control of the master over his household; for the same reason, if the master do not forthwith discharge the servant, upon discovery of his misconduct (or upon a repetition) he will be deemed to have waived his summary right in regard to the same, and cannot on subsequently sending away the servant without notice justify so doing by reason of such bygone misconduct; but in one case (*b*) it was held that a master who had dismissed a servant might justify the dismissal by showing that at the time of the dismissal he knew the servant to have committed an act which justified it, and that a jury ought not to be asked whether the master was induced to dismiss him by that act or by some other cause. Where there has been disobedience, or an act of misconduct by a servant known to the master at the time he discharges him, although the master does not mention that as the

(*a*) Lacy *v.* Osbaldiston, 8 C. & P. 80. Mercer *v.* Whall, 5 Q. B. 447. Hobson *v.* Cowley, 27 L. J. Ex. 205. Reed *v.* Dunsmore, 9 C. & P. 588.

(*b*) Ridgway *v.* Hungerford Market Co., 3 A. & E. 171; et vide Mercer *v.* Whall, 5 Q. B. Rep. 447.

precise ground of discharge, he may afterwards, by showing that the fact existed, and that he knew it, justify such discharge; but it would seem that it is otherwise where the act of misconduct was not known to the master at the time of the discharge, as it could not then be the cause of it (*c*).

Illness is no cause of suspension, or forfeiture, of wages: neither is it any ground of discharge (*d*); unless, indeed, it is clearly a natural consequence of the servant's own immorality, or is such that the servant is wholly and permanently disqualified from performing the service he has undertaken to perform (*e*). In the case of *Harmer* v. *Cornelius*, Willes, J., says:—"Where a skilled labourer, artisan or artist is employed, there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes. An express promise or an express representation in the particular case is not necessary. It may be that, if there is no general and no particular representation of ability and skill, the workman undertakes no responsibility. If a gentleman, for example, should employ a man that is known never to have done anything but sweep a crossing, to clean or mend his watch, the employer would probably be held to have incurred all risk himself. But in the case under consideration the correspondence shows an express and particular representation by the plaintiff that he did possess the requisite skill. The next question is this, supposing that, when the skill and competency of the party employed are tested by the employment, he is found to be utterly incompetent, is the employer bound, nevertheless, to go on employing him to the end of the term? This is a question upon which we have been furnished by the bar with no authority, probably, because such labour being seldom retained for a long time certain, the

(*c*) Cussons v. Skinner, 11 M. & W. 161; sed vide Spotswoode v. Barrow, 19 Law J. 226, Exch.; and Willetts v. Green, 3 Car. & K. 59. Cuckson v. Stones, 28 L. J. Q. B. 25: 1 E. & E. 248.

(*d*) Dalton, p. 141. Wood's Inst. 55. Rex v. Wintersett, Cald. 298. Rex v. Sudbrooke, Smith, 59.

(*e*) Harmer v. Cornelius, 5 C. B. N. S. 236; 28 L. J. C. P. 85. Boast v. Frith, L. R. 4 C. P. 1; 38 L. J. C. P. 1. Robinson v. Davison, L. R. 6 Ex. 269.

question has not often arisen. But it seems very unreasonable that an employer should be compelled to go on employing a man who, having represented himself competent, turns out incompetent. Misconduct in a servant is, according to every day's experience, a justification of a discharge. The failure to afford the requisite skill which had been expressly or impliedly promised, is a breach of a legal duty, and therefore misconduct. The rule of the civil law *Imperitia culpæ adnumeratur* applies."

On the death of the master, the servant is legally discharged (*a*): that he is so, by his own death, is unquestionable.

There is one ground of discharge which not merely justifies, but imperatively calls upon the master to exercise forthwith his power of instant dismissal; such is the situation of the master on discovery of pre-existing undetermined contract between his servant and a former master: and although he will not be liable, if having hired the servant in ignorance of the previous retainer, he discharge him immediately after notice thereof, yet, if he do not, but still continue to employ him, he thereby becomes an abettor of the servant in his misconduct, and will be liable to damages at the suit of the former master (*b*).

If a servant be discharged without notice for a cause which justifies the discharge, the servant is not, it would seem, entitled to any portion of his wages, at the time of his dismissal accruing due, but not at the time payable (*c*).

We have now to see what are the circumstances which will justify a servant in quitting his service without notice. A master has no right to inflict personal chastisement on his servant, even by way of correction, and such an assault would justify the servant in forthwith leaving his place (*d*); much more so, then, would any other criminal assault by a master

(*a*) Wood's Inst. 55. Williams on Executors, 4th ed., 690. Farrow *v.* Wilson, L. R. 4 C. P. 744; 38 L. J. C. P. 326.

(*b*) Fawcet *v.* Beavres, 2 Lev. 63. Anon. Comb. 111. Blake *v.* Lanyon, 6 T. R. 221. Lumley *v.* Gye, 1 E. & B. 216. Hart *v.* Aldridge, Cowp. 54.

(*c*) Turner *v.* Robinson, 6 C. & P. 15; 5 B. & Ad. 789. Ridgway *v.* Hungerford Market Co., 3 A. & E. 171.

(*d*) Fitz. N. B. 168. Winstone *v.* Linn, 1 B. & C. 469; 1 D. & R. M. C. 339, S. C.

upon his servant. Where the master engages to find the servant in victuals, it will also be a good cause of departure, if he fail to do so, or if he only provide bad or insufficient food (*e*). The fact of having got married, however, does not put an end to the contract, but the servant will, notwithstanding, be bound to serve till the hiring be determined, either by efflux of time, or proper notice.

IX.—OF CHARACTER.

The object of the law is to protect the master. by rendering any disclosures made by him *bonâ fide*, in answering inquiries as to his servant's character privileged; and yet to guard the servant against the wanton abuse of this privilege. This object seems to have been attained by the decisions, which establish that a master is not compellable to give a servant any character (*f*), and that no action will lie against him for giving (in answer to inquiries on the subject) an unfavourable, or even, for anything that can be shown by the master to the contrary, a false and slanderous character of his servant, if done *bonâ fide*, with a belief in its truth, and without malice (*g*) ; the rule being, as Lord Campbell observes, "that if the occasion be such as repels the presumption of malice, the communication is privileged, and the plaintiff must then, if he can, give evidence of actual malice," that is to say, of active actual spite; "if he gives no such evidence, it is the office of the judge to say that there is no question for the jury, and to direct a nonsuit, or a verdict for the defendant" (*h*). Thus, where an action was brought by a servant against her former mistress for saying, to a lady who came to inquire for the plaintiff's cha-

(*e*) Fits. N. B. 168.
(*f*) Carrol *v.* Bird, 3 Esp. 201. R. *v.* Brampton, Cald. 11.
(*g*) Edmondson *v.* Stevenson, Bull. N.P. 8. Hargrave *v.* Le Breton, 4 Burr. 2425. Sims *v.* Kiader, 1 C. & P. 279.
(*h*) Taylor *v.* Hawkins, 16 Q. B. 308. See also to the same effect Woodward *v.* Lander, 6 C. & P. 550; Toogood *v.* Spyring, 1 C. M. & R. 193.

racter, that she was saucy and impertinent, and often lay out of her own bed, but was a clean girl, and could do her work well, whereby the plaintiff was prevented from getting a place; it was held by Lord Mansfield, C. J., that this was not to be considered as an action in the common way for defamation by words; but the gist of it must be malice, which was not implied from the occasion of speaking; but should be directly proved: that this was a confidential communication, and ought not to have been disclosed; but that if, without ground, and purely to defame, a false character should be given, it would be a proper ground for an action (*a*).

Where a person, intending to hire a servant, applies to the former master for his character, the master (except express malice is proved) shall not be obliged to prove the truth of the character he gives; for, in such case, the disclosure is not made officiously, but in confidence, and the facts may happen to rest only in the knowledge of the master and servant; but, where the master voluntarily, and without being applied to, speaks defamatory words of his servant, it will be incumbent on him to plead, and prove the truth of them. And it was laid down by Lord Alvanley, C. J., that a master, having, on inquiry, given a bad character of a servant, was not bound to substantiate the truth of it; but that it was equally clear that the servant might, if he could, prove the character to be false (*b*).

Where a written character has been procured by means of a letter, written ostensibly with a view to inquire the servant's character, but in reality to obtain such a written character as the foundation of an action for libel, it has been held that the action cannot be maintained (*c*). And Lord Mansfield is reported to have said, in an action for libel under such circumstances (*d*):—

"I have held, more than once, that an action will "not lie, by a servant against his former master, for "words spoken by him in giving a character of the

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(*a*) Van Spike v. Cleyson, Cro. Eliz. 541.

(*b*) Rogers v. Clifton, 3 B. & P. 591.

(*c*) King v. Waring, 5 Esp. 13.

(*d*) Weatherstone v. Hawkins, 1 T. R. 111.

" servant. In this case, instead of the plaintiff's show-
" ing it to be false and malicious, it appears to be inci-
" dent to the application by Rogers to the master of
" the servant." And it was added by Buller, J.:—
" This is an exception to the general rule [in regard
" to libels] on account of the occasion of writing the
" letter; then it is incumbent on the plaintiff to prove
" the falsehood of it: and in actions of this kind, unless
" he can prove the words to be malicious, as well as
" false, they are not actionable. On this case, it
" evidently appears, that the defendant has been en-
" trapped, because the letter was written on the appli-
" cation of the plaintiff's brother-in-law."

A master will also be justified, in answer to an application, by a person proposing to hire his late servant, for a character, in stating not only those facts within his own immediate personal knowledge, but such others as he may have been credibly informed of, and as in justice to the applicant, ought to be made known to him. This was established in a case (*e*), where the circumstances were these; the defendant's wife, in answer to inquiries respecting plaintiff's character, wrote as follows:—"Mrs. Affleck's compliments to Mrs. S., and is sorry that in reply to her inquiries respecting E. Child, nothing can be in justice said in her favour. She lived with Mrs. A. but for a few weeks, in which short time she frequently conducted herself disgracefully; and Mrs. A. is concerned to add she has, since her dismissal, been credibly informed, she has been and now is a prostitute in Bury." Mrs. Affleck afterwards went to the persons who had recommended the plaintiff to her, and made a similar statement to them. The plaintiff having been nonsuited by Lord Tenterden, he being of opinion that the latter part of the letter was privileged, and that the other communications being made to persons who had recommended the plaintiff, were not evidence of malice; and a rule nisi for a new trial having been moved for, the court refused the rule upon the following grounds. Per Bayley, J.—"It appears to me that the letter complained

(*e*) Child v. Affleck and Ux, 9 B. & C. 403; 4 M. & R. 338.

" of was a privileged communication, and that the non-
" suit was right. In the case of *Rogers* v. *Clifton* (*a*)
" evidence of the falsehood of the imputations was given
" which, independently of the contents of the alleged
" libel, raised the question, whether they had been
" written *bonâ fide*. Here there was no evidence of the
" good conduct of the plaintiff at the period to which
" the letter referred. It has been contended that the
" letter should not have contained the statement of the
" alleged misconduct after the plaintiff left the defen-
" dant's service. But I think that Mrs. Affleck would
" have stopped short of her duty in withholding that in-
" formation, and that she was not bound to disclose the
" names of the persons from whom she received it. Then
" reliance was placed upon the two parol communica-
" tions made by Mrs. Affleck as evidence of malice.
" But it appeared in evidence that both the persons, to
" whom they were made, had recommended the plaintiff
" to her service; it was therefore very natural, and by
" no means malicious, in Mrs. Affleck, to inform them
" of the plaintiff's misconduct." Per Littledale, J.—
" It appears to me that there was not any evidence of
" malice that ought to have been left to the jury. It is
" admitted that an answer to the inquiries made would
" not have been the subject-matter of an action, but it
" is contended, that the latter part of the letter is evi-
" dence of express malice. I think, however, that if
" Mrs. Affleck had received such information, she was
" bound to state it, and, therefore, malice is not to be
" inferred from the letter itself. With regard to the
" other communications, the question is, whether they
" prove that Mrs. Affleck acted maliciously in writing
" the letter; I am of opinion that they do not; for the
" persons to whom they were made had recommended
" the plaintiff, and therefore, a statement to them of her
" misconduct cannot be deemed an officious interference
" If, indeed, the plaintiff had distinctly proved the false-
" hood of the statement, the case would have assumed
" a different shape, but according to the case proved,
" the nonsuit was right." Per Parke, J.—"The rule

(*a*) 3 B. & P. 587.

" laid down by Lord Mansfield, in *Edmondson* v. *Steven-*
" *son*, has been followed ever since. It is, that in
" actions for defamation in giving a character of a ser-
" vant, the gist of it must be malice, which is not im-
" plied from the occasion of speaking, but should be
" directly proved. The question then is, whether the
" plaintiff in this case adduced evidence, which, if laid
" before a jury, could properly lead them to find express
" malice. That does not appear upon the face of the
" letter. *Primâ facie* it is fair, and undoubtedly a
" person asked as to the character of a servant may
" communicate all that is stated in that letter. Inde-
" pendently of the letter, there was no evidence except
" of the two persons who had recommended the plain-
" tiff. The communication to them, therefore was
" not officious, and Mrs. Affleck was justified in making
" it. In *Rogers* v. *Clifton* (*b*), evidence of the good
" conduct of the servant was given, and the communi-
" cation also appeared to be officious. In *Blackburn*
" v. *Blackburn*, the occasion of writing the alleged
" libel did not distinctly appear; it was, therefore, pro-
" perly left to the jury to say, whether it was confi-
" dential and privileged, or not, and they found that it
" was not. Here the letter was undoubtedly *primâ*
" *facie* privileged, the plaintiff, therefore, was bound to
" prove express malice, in order to take away the pri-
" vilege." Per Lord Tenterden, C. J.—" I entirely
" concur in what has fallen from the rest of the court,
" and think that the nonsuit ought not to be dis-
" turbed."

Where the injurious statement has been made, under circumstances tending to show that the master was actuated, not by an anxiety faithfully and truly to reply to the inquiries made by the proposed new master or to put him on his guard against some evil-disposed person (*c*), but by a desire to injure the servant, malice will be inferred, and the master will be responsible in an action of damages for the same; as if the master officiously state to a former master any trivial misconduct of the servant, in order to prevent his giving

(*b*) 3 B. & P. 587.
(*c*) Rogers v. Clifton, ubi sup. Pattison v. Jones, 8 B. & C. 583, Bayley, J.

a second character, and, on being himself applied to, give the servant a bad character, which is shown to be false (*a*); or, if the master, without being applied to, in order to prevent the servant from obtaining a situation, volunteer to give an unfavourable character, the truth of which he be unable to prove (*b*); or where, in answer to inquiries, the charges of misconduct have been coupled with expressions of vindictiveness, and there be no proof of the truth of the imputations (*c*): but malice will not be presumed from the circumstance of a master having, of his own motion, made a person, by whom a servant had been recommended to him, acquainted with such servant's subsequent misconduct, unless the representation be shown to be false, as well as voluntary (*d*).

In *Rogers* v. *Clifton* (*e*) the conduct of the master could scarcely be referred to any other cause than a malicious feeling towards the servant. In *Pattison* v. *Jones* (*f*) the libellous matter complained of by the servant was contained in a letter, written by the former master, in answer to inquiries, respecting the conduct of the servant, made upon the instigation of the defendant, and the jury had found a verdict for the plaintiff. On discharging a rule nisi for a new trial, the several judges delivered their opinions *seriatim*, as follow:—Per Lord Tenterden, C. J.—"It appeared in the case "proved on the part of the plaintiff that the defendant "wrote the first letter to Mr. Mornay without being "called upon by him to do so. The second letter, "which contained the libellous matter, in respect of "which the plaintiff claimed to recover damages, was "certainly written in answer to inquiries made by "Mornay; but, inasmuch as those inquiries were in-"vited by the defendant, I thought it was a question "for the jury, whether the communication contained "in that letter was made by the defendant *bonâ fide*, "acting under a belief that he was discharging a duty "which he owed to the party who was about to take "the plaintiff into his service; or whether it was made

(*a*) Rogers v. Clifton, ubi sup.
(*b*) Pattison v. Jones, 8 M. & R. 101; 8 B. & C. 578.
(*c*) Kelly v. Partington, 4 B. & Ad. 700.
(*d*) Child v. Affleck, 9 B. & C. 403.
(*e*) Ubi sup.
(*f*) Ubi sup.

" maliciously with an intention of doing an injury to the " plaintiff. The jury found that it was made maliciously, " which entitled the plaintiff to a verdict." Per Bayley, J.—" Assuming that the libel set out in the second " count was a privileged communication, it seems to " me that the case was properly submitted to the jury. " Generally speaking, anything said, or written, by " a master when he gives the character of a servant " is a privileged communication. If a servant, there- " fore, charge a master with publishing a libel, it is " competent to the latter, under the general issue, to " prove that the alleged libel was written under such " circumstances as to make it a privileged communica- " tion, and thereby throw on the plaintiff the necessity " of showing that it does not come within that protec- " tion, which the law gives to a privileged communi- " cation. But, if the supposed libel be not communicated " *bonâ fide*, it does not fall within the protection which " the law extends to privileged communications. Here " the second letter of the defendant was written in " answer to one, calling upon him to give an account " of the plaintiff's conduct, but the defendant wrote " his first letter without being called upon so to do. I " do not mean to say that in order to make libellous " matter, written by a master, privileged, it is essential " that the party, who makes the communication, should " be put into action in consequence of a third party's " putting questions to him. I am of opinion that he " may (when he thinks that another is about to take " into his service one whom he knows ought not to " be taken) set himself in motion, and do some act to " induce that other to seek information from, and put " questions to, him. The answers to such questions, " given *bonâ fide*, with the intention of communicating " such facts as the other party ought to know, will, " although they contain slanderous matter, come within " the scope of a privileged communication. But in " such a case it will be a question for a jury, whether " the defendant has acted *bonâ fide*, intending honestly " to discharge a duty; or whether he acted maliciously, " intending to do an injury to the servant? In forming " their judgment the jury were bound to take into " their consideration the fact of the defendant's volun-

" tarily having put himself into motion, and thereby " in effect having, by the first letter, desired Mr. Mornay " to put questions to him. These questions were put, " and gave occasion for the second letter. The ques- " tion for the jury to consider was, whether the de- " fendant acted honestly, and *bonâ fide*, in making the " representation contained in that letter? The jury " had that question submitted to their consideration, " and they were of opinion, that the communication was " not made *bonâ fide*, but that it was made with the " intention to injure the plaintiff: and if it was made " with that intention, it was not a privileged communi- " cation." Per Littledale, J.—" It seems to me that " the letter, taken by itself, is a libel; but if it was a " privileged communication, it was not necessary for the " defendant to plead a justification; he might make that " a defence on the general issue, and give evidence to " satisfy the jury, that, under the circumstances of the " case, it was a *bonâ fide* communication. That question " was properly submitted to their consideration, and " they have come to a conclusion that it was not made " *bonâ fide*, and that the defendant was actuated by " malice. I perhaps should not have come to the same " conclusion; but I think the verdict ought not to be " disturbed. Upon the question, whether a master, " who has written a libel in giving the character of a " servant, has acted *bonâ fide*, or not, it may make a " very material difference, whether he volunteered to " give the character, or had been called upon so to do. " At all events, when he volunteers to give the charac- " ter, stronger evidence will be required, that he acted " *bonâ fide*, than in the case, where he has given the " character after being required so to do." In *Kelly* v. *Partington* (*a*) the servant had recovered a verdict, and on discharging a rule for a new trial, Lord Denman observed,—" Where nothing has taken place but what " has been said by one master to another, the case " ought never to come before a jury. But where there " are other circumstances from which a private motive " may be presumed, there the case may well be con- " sidered by a jury. There were in this case other cir-

(*a*) 2 Nev. & M. 461; 4 B. & Ad. 700, S. C.

" cumstances, such as the refusal to produce the book, " which might have disproved some part of the charge " against the plaintiff; and the answer, 'What is that " to us?'" when the brother in-law said that the defen- " dant's conduct might have driven the plaintiff upon the " town. These circumstances were slight, but it was " proper that they should go to the jury."—Littledale and Parke, Js., concurred. The case was, however, disposed of upon another ground.

In another case the plaintiff, a domestic servant, about to enter the service of B., referred B. for her character to the defendant, in whose service she had been. The defendant being at that time unwell, her husband answered the inquiries of B., and gave the plaintiff a good character, and B, thereupon took the plaintiff into service. The defendant having recovered, wrote to B. on other matters, and in her letter said she had lately been much imposed upon in her kitchen. This letter occasioned further inquiries to be made by B. of the defendant as to the plaintiff's character, and the defendant, in answer to those inquiries, spoke the words complained of, viz., that she suspected the plaintiff of dishonesty. It was held that the defendant was bound to correct any error as to the plaintiff's character into which she supposed B. to have been led by the answer to B.'s first inquiries; and that the words were spoken under such circumstances as *primâ facie* to be privileged. It was also held that the facts, that the defendant alluded to the plaintiff, and induced further inquiries about her, were not evidence of malice (*b*). So, too, where a letter was written by an employer to the person who had recommended a servant to him, and upon whose recommendation the employer had engaged the servant, stating that the servant's conduct had not justified the recommendation given, and that he had left a balance unaccounted for, and that he ought not to be recommended for morality or honesty, the letter was held privileged (*c*).

It will be seen, therefore, that in order to deprive a communication made by a master, with regard to the

(*b*) Gardner *v.* Slade and wife, 13 Q. B. Rep. 796.
(*c*) Dixon *v.* Parsons, 1 F. & F. 24.

misconduct of his servant, of its privileged character, it must be shown to have been malicious (*a*), either by proving that the charges were untrue, and made without probable cause (*b*), or that the master had gone out of his way in order to prevent a former master from giving a character, and that that, given by himself, was false (*c*), or by proving that the inquiries which led to the defamatory communication, were officiously invited, or the latter volunteered gratuitously (*d*), or, if asked for, given in a hostile or vindictive manner, or made in violent and abusive terms, the words used being plainly stronger than the occasion justified, the master not being able to support the allegations complained of.

Where a servant has been guilty of robbing his master, or other criminal misconduct, it seems that the master would be justified in warning any persons purposing to take such servant into their employment (*e*); but, unless prepared with evidence to substantiate the charge, the master would incur considerable risk by so doing. But in one case, a servant had left his master's house, having been dismissed upon a charge of theft, and was afterwards discovered by the master in communication with the other servants whereupon the master, addressing his servants, said, "I have dismissed that man for robbing me; do not speak to him any more in public or private, or I shall think you as bad as he." This was held to be a privileged communication (*f*). A master in dismissing his servant told him that he did so because he had robbed him; and this he said in the presence of a neighbour and friend whom he had called in for the purpose of hearing the statement. This was held to be a privileged communication. A master having refused to give his servant a character, was applied to by the brother of the servant for his reason, whereupon he said, "I believe he has robbed me for years, and I

(*a*) Edmonson *v.* Stevenson, Bull. N. P. 8.
(*b*) Child *v.* Affleck, 9 B. & C. 403.
(*c*) Rogers *v.* Clifton, 3 B. & P. 587.
(*d*) Pattison *v.* Jones, 3 M. & R. 101; 8 B. & C. 578.
(*e*) Rogers *v.* Clifton, ubi sup. Pattison *v.* Jones, ubi sup.
(*f*) Somerville *v.* Hawkins, 20 Law J. 131, c. b.; 10 C. B. Rep. 583, S. C. Kelly *v.* Partington, 4 B. & Ad. 700. Brown *v.* Croome, 2 Stark. 297. Godson *v.* Home, 1 B. & B. 7.

can prove it by the circumstances under which he was discharged." This was held to be a privileged communication, although the servant had been dismissed upon a charge of one particular theft only (*g*).

Where a master gave notice to quit to his footman and his cook, they went to him separately and asked him his reason for discharging them, and he informed them each, in the absence of the other, that he, or she, was dismissed because they had both been robbing him, it was held that neither could maintain an action for the slanderous words spoken of them to the other, unless actual malice was shown by them to have existed on the part of the master (*h*). Where the directors of a public company, employed in accordance with the provisions of the articles of association, made a report reflecting upon the conduct of the company's manager, and the directors had the report printed and circulated amongst the shareholders, it was held that the communication was privileged, and that, in the absence of actual malice, no action would lie against the directors (*i*). In another case, where the defendant having been asked for the character of a governess, and why she had parted with her, replied that it was "on account of her incompetency, and not being lady-like, nor good tempered," and it was shown that the governess had served the defendant above a year, and had twice received good characters during the year from the defendant when other persons had asked for her character as governess, and general evidence was given rebutting the charges, it was held, that the defendant could not succeed without giving some evidence in support of the charges made, and that there was evidence of malice for the jury; and Patteson, J., observed, that "if the plaintiff makes out a *primâ facie* case of malice, it certainly lies on the defendant to answer it. When it is said that he must prove the

(*g*) Taylor *v.* Hawkins, 20 Law J. 313, q. b.; 16 Q. B. Rep. 308, S. C.; et vide Harris *v.* Thompson, 13 C. B. Rep. 333.

(*h*) Manby *v.* Witt, 18 C. B. 544; 25 L. J. C. P. 294. Somerville *v.* Hawkins, 10 C. B. 583. Davies *v.* Snead, L. R. 5 Q. B. 608.

(*i*) Lawless *v.* Anglo Egyptian Cotton Co., L. R. 4 Q. B. 262; 38 L. J. Q. B. 129. Philadelphia, &c., Rly. Co. *v.* Quigley, 21 Howard (Rep. Sup. Ct. U. S.) 202.

truth of his statement, it is not meant in the sense of truth absolutely, but he must show that the assertion was made with an honest belief of its being the truth" (*a*). Where a criminal charge is made by word of mouth, the presence of third parties does not necessarily prevent the person so making the charge from availing himself of the defence of its being a privileged communication, but if it be made before more persons than necessary, or in language more violent than needful, so as needlessly to injure the defendant before others, the defence of privilege is done away with (*b*).

By stat. 32 Geo, 3, c. 56, it is enacted, "that if any person or persons shall falsely personate any master or mistress, or the executor, administrator, wife, relation, housekeeper, steward, agent, or servant, of any such master, or mistress, and shall, either personally, or in writing, give any false, forged, or counterfeited character to any person offering him, or herself, to be hired as a servant into the service of any person or persons:" Or (*c*), "if any person or persons shall knowingly and wilfully pretend, or falsely assert in writing, that any servant has been hired, or retained for any period of time whatsoever, or in any station, or capacity, whatsoever other than that for which, or in which, he, she, or they shall have hired, or retained, such servant in his, her, or their, service or employment, or for the service of any other person or persons:" Or (*d*), "if any person or persons shall knowingly and wilfully pretend, or falsely assert in writing, that any servant was discharged, or left his, her, or their service, at any other time than that at which he, or she, was discharged, or actually left such service, or that any such servant had not been hired, or employed, in any previous service, contrary to truth:" Or (*e*), "if any person shall offer himself, or herself, as a servant, asserting, or pretending, that he, or she, hath served in any service, in which such

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(*a*) Fountain v. Boodle, 3 Q. B. 11. (*b*) Toogood v. Spyring, 1 C. M. & R. 181. Padmore v. Lawrence, 11 A. & E. 382. Amman v. Damm, 8 C. B. N. S. 597. Davies v. Snead, L. R. 5 Q. B. 608. Somerville v. Hawkins, 10 C. B. 583; 20 L. J. C. B. 131; Taylor v. Hawkins, 20 L. J. Q. B. 313; 16 Q. B. 308.
(*c*) Sect. 2.
(*d*) Sect. 3.
(*e*) Sect. 4.

servant shall not actually have served, or with a false, forged, or counterfeit certificate of his, or her character, or shall in anywise add to or alter, efface, or erase, any word, date, matter, or thing, contained in, or referred to, in any certificate, given to him, or her, by his, or her, last, or former, actual master, or mistress, or by any other person or persons, duly authorized by such master, or mistress, to give the same:" Or (*f*), "if any person or persons, having before been in service, shall, when offering to hire himself, herself, or themselves, as a servant, or servants, in any service whatsoever, falsely and wilfully pretend not to have been hired, or retained in any previous service as a servant:" and (*g*) "shall be convicted of any, or either, of the offence or offences, aforesaid, by his, her, or their, confession, or by the oath of one, or more, credible witness, or witnesses, before two or more justices of the peace for the county, riding, division, city, liberty, town, or place, where the offence, or offences, shall have been committed (which oath such justices are hereby empowered and required to administer), every such offender or offenders shall forfeit the sum of 20*l.*; one moiety whereof shall be paid to the person, or persons, on whose information the party, or parties, offending shall have been convicted, and the other moiety thereof shall go, and be applied, for the use of the poor of the parish, wherein the offence shall have been committed: and if the party who shall have been so convicted, shall not immediately pay the sum of 20*l.* so forfeited, together with the sum of 10*s.* for the costs and charges attending such conviction, or shall not give notice of appeal, and enter into recognizance in the manner hereinafter mentioned, and in that behalf provided, such justices shall and may commit every such offender to the house of correction, or some other prison of the county, riding, division, city, liberty, town, or place, in which he, or she shall have been convicted, there to remain, and be kept to hard labour, without bail or mainprize, for any time, not exceeding three months, nor less than one month, or until he or she pay the said sum so forfeited,

(*f*) Sect. 5. (*g*) Sect. 6.

together with such costs and charges as aforesaid. Provided always, that if any servant or servants, who shall have been guilty of any of the offences aforesaid, shall before any information has been given, or lodged against him, her, or them, for such offence, discover, and inform, against any person, or persons, concerned with him, her, or them, in any offence against this Act, so as such offender, or offenders, be convicted of such offence in manner aforesaid, every such servant, or servants, so discovering and informing, shall thereupon be discharged and indemnified, of, from and against all penalties and punishments, to which at the time of such information given, he, she, or they, might be liable by this Act, for or by reason of such his, her, or their own offence or offences" (*a*). A concise form of conviction is then given. And lastly it is provided (*b*), "That if any person shall think himself, or herself, aggrieved by any thing done in pursuance of this Act, such person may appeal to the justices of the peace, at the next general or quarter sessions of the peace to be held for the county, or place, wherein the cause of complaint shall have arisen, such appellant entering into a recognizance, with two sufficient sureties, in the sum of 20*l.* each, conditioned to try such appeal, and abide the order of, and to pay such costs as shall be awarded by, such justices at such general or quarter sessions, upon due proof of such notice being given as aforesaid, and of the entering into such recognizance; which said justices shall hear, and finally determine, the causes and matters of such appeal, in a summary way, and award such costs to the parties appealing, or appealed against as they the said justices shall think proper, and the determination of such general or quarter sessions shall be final, binding, and conclusive, to all intents and purposes; and no conviction, or order made, concerning any matters aforesaid, or any other proceedings to be had touching the conviction, or convictions, of any offender or offenders against this Act, shall be quashed for want of form, or be removed by *certiorari*, or any other writ or process whatsoever,

(*a*) Sect. 9. (*b*) Sect. 10.

into any of His Majesty's courts of record at Westminster."

There is a case (*c*) mentioned to have been tried, at Guildhall, at the sittings after Trinity Term, 1792, against a person, who had knowingly given a false character of a man to the plaintiff, who was thereby induced to take him into his service, and who was soon afterwards robbed by him of property to a great amount, for which the servant was executed; in which the plaintiff recovered damages against the defendant to the extent of his loss. The point is one of much importance to the public, and there can be no doubt but that such a finding would be in strict accordance with every principle of law and justice. Making a false representation as to the character of a servant, whereby he obtains employment, renders the party making it liable to the party employing him for any loss he may sustain from any misconduct of such servant inconsistent with such representation (*d*). If a man will wickedly assert that which he knows to be false, and thereby draws his neighbour into a heavy loss, even though it be under the specious pretence of serving his friend, in the words of Buller, J., in a celebrated case, *ausis talibus istis non jura subserviunt* (*e*).

X.—OF TRADES UNIONS, COMBINATIONS, AND STRIKES.

In considering the question of the lawfulness of combinations of masters, and those of workmen, it will be convenient in the first place to discuss their legality under the common law, and afterwards to consider how far the common law has been modified by statute. Under the common law every man has a right to full freedom in disposing of his own labour,

(*c*) Parley *v.* Freeman, 1 Blk. Com. 432, Edn. by Christian.

(*d*) Foster *v.* Charles, 6 Bing. 396, and 7 Bing. 105.

(*e*) Pasley *v.* Freeman, 3 T. R. 51.

or of his own capital, and consequently no man has a right to obstruct another in any disposition which that other may choose to make of his own labour or capital, to a greater or larger extent than is absolutely necessary for the preservation of his own rights. Any infringement of another's rights, not justified by its being necessary for the preservation of the party's own rights, is a wrong, and is to be remedied by action, or by indictment, as the case may be. "As to combinations," says Erle, C. J., in his Treatise on Trades Unions, "each person has a right to choose whether he will "labour or not, and also to choose the terms on which "he will labour, if labour be his choice. The power "of choice in respect of labour and terms, which one "person may exercise and declare singly, many may, "after consultation, exercise jointly, and they may make "a simultaneous declaration of their choice, and may "lawfully act thereon for the immediate purpose of "obtaining the required terms; but they cannot create "any mutual obligation having the legal effect of "binding each other not to work, or not to employ, "unless upon terms allowed by the combination" (*a*). It is doubtful whether a combination to raise or lower the rate of wages is permissible at common law (*b*); but it is clear that a combination to coerce another in the exercise of his trade, or to compel him to carry it on in any particular manner, or subject to any particular regulations, is illegal, and indictable as a conspiracy at common law (*c*). In the case of *Walsby* v. *Anley*, Walsby and certain other workmen agreed to leave Anley's employment simultaneously, unless Anley discharged certain other workmen. It was held by Crompton and Hill, JJ., that this was a conspiracy indictable at common law. The case itself, however, was ultimately decided on other grounds, as it was held that a threat had been made use of within the meaning of a statute (6 Geo.

(*a*) Erle on Trades Unions, p. 23. Adopted by Hannen, J. in Farrer v. Close, L. R. 4 Q. B. 612.

(*b*) R. v. Tailors of Cambridge, 8 Mod. 11. R. v. Hammond, 2 Esp. 719. R. v. Mawbey, 6 T. R. 636. Hilton v. Eckersley, 6 E. & B. 69 R. v. Eccles, 1 Lea. 274.

(*c*) Farrer v. Close, L. R. 4 Q. B. 602, 612. R. v. Rowlands, 5 Cox C. C. 436. Erle on Trades Unions, p. 42.

4, c. 129,) which has been since repealed (*d*). This repealed statute expressly provided that meetings might be held for the purpose of consulting upon and determining the rate of wages, and it would seem that under the recent Acts (*e*), such meetings are legitimate. It is enacted that "the purposes of any trade "union shall not by reason merely that they are in "restraint of trade, be deemed to be unlawful so as to "render any member of such trade union liable to "criminal prosecution for conspiracy or otherwise" (*f*). And "that no person shall be liable to any punishment "for doing or conspiring to do any act on the ground "that such act restrains or tends to restrain the free "course of trade, unless such act is one of the acts "specified in the section, and is done with the object "of coercing as in the section before mentioned" (*f*). The result of the above enactments is that it is no longer possible, as would formerly appear to have been the case, where the statute law did not interfere, for any act or combination to be adjudged criminal on the ground that it appeared to the court to be in restraint of trade.

As has been before stated, it is a wrong, and actionable, for a person to induce a servant to quit his master's service, before the period of his hiring has expired, and it is equally a wrong whether it be done by one or by many. There is, however, this distinction between a wrong done by one, and one done by many. A combination to do a wrong, in a matter wherein the public are interested, is a conspiracy, and as such punishable by indictment; the remedy by indictment being in addition to the remedy provided by the civil courts by action. Though an act or combination is not criminal now, whatever it may have been, merely by reason of its being in restraint of the free course of trade, yet any combination which has for its purpose or object the injury of any particular person or class of persons is undoubtedly a criminal combination. Whether a combination or act which does obstruct the free course of trade is unlawful or not may, in certain

(*d*) Walsby *v.* Anley, 30 L. J. M. C. 121; 3 E. & E. 516.

(*e*) 34 & 35 Vict. cc. 31, 32.

(*f*) 34 & 35 Vict. c. 32, s. 1.

cases, depend on the purpose of the actor, or parties to the combination. If a combination is formed, from motives of spite, to prevent a certain person, or class of persons, from obtaining work, such a combination would still be indictable (*a*). In the case of *Purchon* v. *Hartley and others*, which was an action brought by a discharged workman against certain of his fellow workmen to recover damages occasioned by his discharge, the jury were directed by Hannen, J., "that if the men combined, not for the purpose of "injuring the plaintiff, but to protect their own "legitimate interests, and did nothing more than was "necessary for the protection of those interests, they "would not be answerable merely because the conse-"quences of their act injured another. If a man "sinned against the rules of the society, whether it "was or was not competent for the other members to "deprive him of the benefits of the society, the "members were not entitled to combine together and "make a statement to the employer, for the purpose "of getting him turned out of his situation, because "he had so offended. Under some circumstances, "probably workmen would be justified in presenting "to their master reasons for the dismissal of a fellow "workman, for example if he were an habitual blas-"phemer, but they were not justified in setting them-"selves up as judges of the conduct of a man in that "which the law permitted him to do with regard to "his labour" (*b*).

By the recent statute 34 & 35 Vict. c. 32, it is enacted that,—

"Every person who shall do any one or more of the following acts, that is to say—

(1.) Use violence to any person or any property,

(2.) Threaten or intimidate any person in such manner as would justify a justice of the peace on complaint made to him, to bind over the person so threatening or intimidating to keep the peace,

(3.) Molest or obstruct any person in manner defined by this section,

(*a*) Erle on Trades Unions, pp. 13, 22, 74.

(*b*) Purchon v. Hartley and others, Law T., Aug. 19th, 1871.

with a view to coerce such person,—

(1.) Being a master, to dismiss or cease to employ any workman, or being a workman to quit any employment or to return work before it is finished;

(2.) Being a master not to offer or being a workman not to accept any employment or work;

(3.) Being a master or workman to belong to or not to belong to any temporary or permanent association or combination;

(4.) Being a master or workman to pay any fine or penalty imposed by any temporary or permanent association or combination;

(5.) Being a master to alter the mode of carrying on his business, or the number or description of any persons employed by him,

shall be liable to imprisonment, with or without hard labour, for a term not exceeding three months:

A person shall, for the purposes of this Act, be deemed to molest or obstruct another person in any of the following cases; that is to say,

(1.) If he persistently follow such person about from place to place:

(2.) If he hide any tools, clothes, or other property owned or used by such person, or deprive him of or hinder him in the use thereof:

(3.) If he watch or beset the house or other place where such person resides or works, or carries on business, or happens to be, or the approach to such house or place, or if with two or more other persons he follow such person in a disorderly manner in or through any street or road.

Nothing in this section shall prevent any person from being liable under any other Act, or otherwise, to any other or higher punishment than is provided for any offence by this section, so that no person be punished twice for the same offence" (*c*).

All offences under this Act must be prosecuted under the Summary Jurisdiction Acts.

(*c*) 34 & 35 Vict. c. 32, s. 1.

In any place within the jurisdiction of a metropolitan police magistrate or other stipendiary magistrate, before such magistrate or his substitute.

In the city of London before the Lord Mayor or an alderman:

In other places in England, before two or more justices in petty sessions (*a*).

By sect. 3, an appeal is given to quarter sessions.

By sect. 5, interested persons are not to act as members either of the court of summary jurisdiction or of appeal.

To complete a crime punishable under the above sections, there must be one of certain forbidden acts, and also one of certain forbidden intentions, and the forbidden act must be accompanied by the forbidden intention. The following decisions, though given under a former Act, are still useful on this subject:—Where the secretary of a trade union, having conversed with two workmen, who at once ceased working, was applied to by the employer for information as to the cause of the cessation, replied, "You must know it is on account of your apprentices," and afterwards, on being written to by the employer, asking what he was required by the union to do, communicated to the employer the following resolution—"At a meeting of the society, it was resolved unanimously, that no society bricklayer do work for B. (the employer), until he parts with some of his apprentices, &c:" It was held that as the justices before whom the case was heard, had not drawn the inference that the communication of the resolution, in answer to inquiries, was intended as a threat, the evidence without such inference (which the Court of Queen's Bench thought ought not to be drawn), was not sufficient to justify a conviction of the secretary (*b*). Where the secretary of a trade union wrote threatening a strike, unless the employer dismissed a certain non-union man, he was convicted (*c*). The distinction between the two cases is, that in the one a strike had already commenced,

(*a*) 34 & 35 Vict. c. 32, s. 2.
(*b*) Wood v. Bowron, L. R. 2 Q. B. 21.
(*c*) Skinner v. Kitch, L. R. 2 Q. B. 393. O'Neil v. Longman, 4 B. & S. 376. As to molesting or obstructing, see R. v. Druit, 10 Cox C. C. 592.

and the secretary *bonâ fide* gave the employer information as to the causes of it; whereas in the other, the secretary threatened a strike with a view to coerce the employer.

The term trade union is defined by the Trade Union Act, 1871 (*d*), to mean "such combination, whether temporary or permanent, for regulating the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business as would, if this Act had not passed, have been deemed to have been an unlawful combination, by reason of some one or more of its purposes being in restraint of trade."

The Act (*e*) provides that "the purposes of any trade union, shall not by reason merely that they are in restraint of trade, be deemed to be unlawful, so as to render void or voidable any agreement or trust." "Nothing in this Act shall enable any court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely;—

1. Any agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ or be employed.
2. Any agreement for the payment by any person of any subscription or penalty to a trade union.
3. Any agreement for the application of the funds of a trade union.
   (*a*) To provide benefits to members.
   (*b*) To furnish contributions to any employer or workman, not a member of such trade union, in consideration of such employer or workman acting in conformity with the rules or resolutions of such trade union; or

(*d*) 34 & 35 Vict. c. 31, s. 23. (*e*) 34 & 35 Vict. c. 31, ss. 3, 4.

(*c*) To discharge any fine imposed upon any person by sentence of a court of justice; or

4. Any agreement made between one trade union and another; or

5. Any bond to secure the performance of any of the above-mentioned agreements.

But nothing in this section shall be deemed to constitute any of the above-mentioned agreements unlawful."

The Act permits the registration of trades unions, but provides that if any one of the purposes of a trade union be unlawful, the registration shall be void (*a*). It vests the property of registered unions in trustees to be appointed as provided by the Act (*b*). The trustees of registered unions, or any other officer of the union, who may be authorized to do so by the rules thereof, may bring or defend actions, suits, prosecutions, or complaints on behalf of the union in their own proper names without other description than the title of their office (*c*).

Officers and members are made punishable summarily for certain offences, such as withholding money belonging to the union, &c. (*d*). It may be well to note that every registered union is compelled, under a penalty, to have a registered office, and that a copy of the rules are to be delivered by the trade union to every person on demand on payment of a sum not exceeding one shilling (*e*).

A simultaneous stoppage of work of a number of workmen really intended for the purpose of raising wages, is not punishable, yet a simultaneous stoppage for the immediate purpose of injuring an employer, or injuring a particular workman, or class of workmen, although the ultimate result anticipated may be the raising of wages, is still a conspiracy at common law, and consequently a misdemeanor. Hannen, J., in delivering his judgment in *Farrer* v. *Close* (*f*), says, "I am, however, of opinion that strikes are not necessarily

(*a*) 34 & 35 Vict. c. 31, s. 6.
(*b*) Id. s. 8.
(*c*) Id. s. 9.
(*d*) Id. s. 12.
(*e*) Id. ss. 15, 14, 18.
(*f*) L. R. 4 Q. B. 602, 612. Erle on Trades Unions, p. 73.

illegal. A strike is properly defined as 'a simultaneous cessation of work on the part of workmen,' and its legality or illegality must depend on the means by which it is enforced, and on its objects. It may be criminal, as if it be part of a combination for the purpose of injuring or molesting either masters or men; or it may be simply illegal, as if it be the result of an agreement depriving those engaged in it of their liberty of action, or it may be perfectly innocent, as if it be the result of the voluntary combination of the men for the purpose only of benefiting themselves by raising their wages, or for any other lawful purpose."

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